



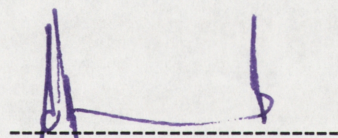
TRANSFORMATIVE PRACTICES

Women, Law and Development in India

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This sub-thesis, entitled *Transformative Practices: Women, Law and Development in India*, is all my own work and all sources used have been acknowledged.



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“The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity...as long as there are tears and suffering, so long our work will not be over.”

Jawaharlal Nehru, “Tryst With Destiny”,

Speech delivered in the Constituent Assembly, New Delhi, 14 August 1947.

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GLOSSARY**Hindi Terms**

Aggarbati	incense
Angoota chhap	thumb print
Arrack	village alcohol
Bidi	a handrolled cigarette
Chamar	a Dalit caste
Dalit	a term for the <i>Untouchable</i> caste
Goonda	lout, bully
Harijan	another term for Dalit
Lodh	a low ranking caste
Lok Sabha	the People's Assembly, the lower house of Indian Parliament
Panchayati Raj	local government forum
Purdah	the custom of the seclusion of women
Rajya Sabha	the State Assembly, the upper house of Indian Parliament
Sarpanch	chairperson of the Panchayat
Sarpanch-pati	husband of the chairwoman of the Panchayat
Sati	(contemporary spelling of suttee), the custom of the wife burning herself alive upon her husband's funeral pyre
Subziwalli	female vegetable vendor
Tendu	a dense evergreen tree

Acronyms

ADB	Asian Development Bank
APEC	Asia-Pacific Economic Co-operation
ASEAN	Association of South East Asian Nations
AusAID	Australian Agency for International Development
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CLADEM	Latin American and Caribbean Committee for the Defense of Women's Rights
CLS	Critical Legal Studies
DAC	(OECD) Development Assistance Committee
GAD	Gender and Development
GATT	General Agreement on Tariffs and Trade
GNP	Gross National Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
IMF	International Monetary Fund
NGO	Non-Governmental Organisation*

ODA	Overseas Development Administration (UK)
OECD	Organization for Economic Co-operation and Development
PIL	Public Interest Litigation
Rs	Indian Rupees
SAL	Social Action Litigation
SAP	Structural Adjustment Program
SCs	Scheduled Castes
SEWA	Self-Employed Women's Association
SNDT	Shreemati Nathibai Damodar Thackeray (Women's University in Maharashtra and Gujarat, India)
STs	Scheduled Tribes
TNC	Trans-National Corporation
TRIPS	Agreement on Trade Related aspects of Intellectual Property
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Economic Social and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNSNA	United Nations System of National Accounts
USA	United States of America
USAID	United States Agency for International Development
WFP	World Food Programme
WHO	World Health Organization
WID	Women in Development
WTO	World Trade Organization

* The term 'Non-Governmental Organisations' (NGOs) can be used to refer to a variety of organisations (eg. women activist groups, development organisations, political parties, trade unions etc). For the purposes of this thesis, when referring generally to NGOs I use the term *NGOs*. The only distinction I make is between international NGOs which I call *western NGOs* and local Indian NGOs, which I classify *voluntary organisations*. Although it is not accurate to use such generalised categories, and in particular to classify such a variety of organisations in India as voluntary organisations, I do so for the purposes of clarity, given the limitations of this sub-thesis.

Note:

On several occasions in this thesis I draw a distinction between Western countries/ developed countries / First World / North on the one hand and developing countries / Third World / South on the other. I recognise the problems of oversimplification, and the reinforcement of existing economic, political and cultural hierarchies this perpetuates. However, because this terminology is available and because it does enable me to distinguish between the two groups, I have used these terms, but not unquestioningly.

INTRODUCTION

The central contention of this thesis is that the *economic approach* currently dominating the field of law and development will assist developing countries to engage in the new international economic agenda of economic globalisation, trade and investment liberalisation, but fails to address the development needs of disadvantaged women. I argue for a middle way, between Trubeck and Galanter's skepticism of law and development and the current economic approach to law and development. This middle path is what I term the *rights-based approach*. A rights-based approach incorporates human rights, democracy, civil society, and good governance more effectively in the analysis, thereby allowing women's needs to be more adequately addressed in this field. Local theory and practices from India are examined to provide a context for demonstrating how a rights-based approach may be applied. Contemporary Indian feminist legal theory provides alternative views of the law, which enable women to engage with the law more effectively and which complement a rights-based approach. The analysis of local practices in India illustrates the transformative possibilities of both contemporary Indian feminist legal theory and the rights-based approach when applied in practice.

The Limitations

Given the scope of this sub-thesis I have had to narrowly define the topic and so will identify the limitations right from the beginning. In examining the possibilities of law, as it relates to economically and politically disadvantaged women, this thesis does not propose to provide an alternative theory of law and development. Nor does this thesis attempt to provide a grand feminist theory of law and development. The analysis of law and development has focused on disadvantaged women because they are one of the most marginalised groups in India in terms of benefiting from development measures. Therefore, in examining the topic from this vantage point, one is more clearly and directly able to see where the law fails to have a developmental impact. This thesis ~~some of~~ identifies some gaps in the law and

development literature, with reference to gender issues, recognising that further analysis in these areas would be beneficial for the field.

The analysis is confined to the Indian context and within that the focus rests primarily on Kapur and Cossman's theory of law as a *subversive site*, and on the case studies examined. Although this thesis focuses on the situation in India, these issues are not unique to India and the lessons can be extrapolated for comparison with situations in other countries and for testing theories of law and development generally.

Lastly, in choosing to look at the relationship between women law and development in India, I have chosen to work in the margins of each of these fields, which in of themselves are very large fields. Where possible discussions are grounded in the literature of these fields. However, to enable an examination of the *intersections* between these fields I ask the reader to grant the latitude to skim over the major bodies of literature.

What new dimensions are explored?

Volumes of literature have been written, both within India and internationally, in each of the fields of *law and development*, *women and law*, and *women and development*. Commonly each area of research has been approached as a distinct and isolated field. The law and development literature rarely addresses gender issues. The women and law literature coming from within India addresses development issues to some extent, but tends not to link in with the wider law and development literature. Similarly, the role of law is often a marginal issue in the women and development literature. This thesis examines that select and narrow area which intersects these three fields. By analysing the margins one can locate a space of radical openness and possibility.

...to make visible the unseen can also mean a change of level, addressing oneself to a layer of material which had hitherto had no pertinence for

history and which had not been recognized as having any moral, aesthetic or historical value (Foucault quoted in Spivak 1995, pp.27-28).

In examining the relatively unexplored area lying between the three fields of women, law, and development, a space is created for the (previously absent) women's issues to be addressed in the field of law and development.

The historical and contemporary experiences of the Indian women's movement with law reform provide a useful contribution to the current debate in law and development as to whether or not law can be an *independent variable* in the instigation of social change. The historical contexts and the case studies show that women can be more successful in their engagements with the law if their expectations of it stem from the view of the law as a *dependent variable*. In the case studies especially it becomes apparent that legal solutions alone can not deliver development benefits to women. A number of non-legal factors are also required (eg a strong and active civil society, training, education, public demonstrations) for the law to be able to make a useful intervention.

The case studies presented are well known examples in India and have been written about in a number of contexts, but are explored differently in this thesis in two respects. Firstly, they are examined as examples of the field of law and development. Secondly, the studies are used to demonstrate the practical application of the rights-based approach as informed by a feminist analysis.

How the argument is constructed....

To begin with Chapter One provides a context for considering law and development in the 1990s by examining the history of law and development in the 1960s in America, its demise in the 1970s, and a brief overview of alternative theories of *development*. This is followed by an examination of law and development in the 1990s, which focuses on the *economic approach* to law and development (ie focusing on the commercial sphere to enable developing countries to participate in economic

globalisation, for the benefit of economic growth). The analysis of the economic approach highlights the negative impacts of the approach on disadvantaged women.

In Chapter Two the economic approach is contrasted with an emerging body of writing which I term the *rights-based approach* to law and development. This alternative approach is based on the promotion of people's human rights. The advantages of a rights-based approach are that it allows issues of democracy, civil society, and good governance to be more effectively included in law and development, and used critically, the rights-based approach can enable women's issues to be more effectively addressed within law and development. The rights-based approach is not treated as a replacement for the economic approach, because the realism of today's world is that economic globalisation is not something that can be wished away. Rather, it is proposed that the rights-based approach be used to broaden the field of law and development.

In the third chapter women's experiences with the law in India are used to locate the rights-based approach in a localised context. Firstly, a historical overview is presented, from which one of the emerging themes is the frustration women's groups in India have experienced in using legal strategies to achieve social, economic, and political change. In light of this historical context the legal possibilities for women in India today are examined, drawing on the level of theory, activism and practical case examples occurring in India today.

Contemporary Indian feminist legal theory provides women with the scope for engaging with the legal system in new ways. In particular the work of Kapur and Cossman in their recent publication *Subversive Sites: Feminist Engagements With Law in India* (1996) is used to demonstrate this. Drawing on western legal feminist theory, Indian feminist theory, and on the historical and contemporary experiences of women's groups in India, Kapur and Cossman reconsider the law as a *subversive site* in which women can engage as active players, to re-negotiate their meanings, positions and needs. This theoretical underpinning provides an inspiring means for

women in India to engage with the law in different ways. The field of women and law is linked with the field of law and development by situating Kapur and Cossman's theoretical analysis within a rights-based approach to development.

Chapter Four outlines three case studies: unionisation in the informal sector, women's representation in Panchayats, and social action litigation. I draw on information that I gathered in a field trip I made in 1997 to visit women's organisations and development organisations in India. The case studies provide a local context for the theories discussed in Chapters Two and Three, showcasing Indian women's experiences with using the law to protect their rights. The legal strategies adopted by these women demonstrate the transformative potential of viewing the law as a subversive site, within a rights-based approach, when applied in practice.

In the final chapter the different perspectives introduced throughout the thesis are – re-examined from the viewpoint of the three organisational experiments currently underway in India. How does each of these initiatives engage with the law to address women's development issues? I suggest we can see all the perspectives implicitly at work – law is being approached as a subversive site; women's rights are substantially being re-understood as human rights; a rights-based approach to law and development is adopted; and good governance, civil society and democratic values have been substantially addressed. In all the cases examined these issues are not divorced from the practical – women are active players receiving tangible benefits. These examples demonstrate how local, national and international, traditional, colonial and post-colonial, formal and informal legal codes overlap (Wilson 1997, p.11). Meanings are constructed and negotiated within this terrain. The process of contestation enables women to participate within the legal domain and to reconstruct meanings for their benefit. I conclude in this thesis that the case studies are illustrations of the transformative potential of a rights-based approach, as a useful mechanism for accessing resources and achieving sustainable development for women in India.

1. LAW AND DEVELOPMENT

The field of *law and development* is distinct from either law or development, in that it focuses on the relationship between law and development, primarily in developing countries.¹ This chapter examines the historical emergence of law and development as a distinct field of theory and practice in the 1960s in America and its subsequent demise in the 1970s. The experience of law and development in the 1960s provides a historical and theoretical context for the distinctive character of the law and development field that is now emerging in the 1990s. In the 1990s, law and development is dominated by what I term the *economic approach*. Under this approach, law and development projects are becoming one of the primary mechanisms for establishing the environment necessary for economic globalisation to firmly establish its foothold. The economic approach has received substantive criticisms for its impact on developing countries and its marginalisation of women, which are outlined in this chapter. The chapter concludes with a comparison of the field of law and development in the 1960s against the character it has taken on in the 1990s. The comparison shows the advances that have been made in the field over time, but it also demonstrates which lessons have not been tackled under the economic approach to law and development.

1.1 Law and Development in the 1960s

Although the field of law and development has a history stemming from the period of colonial rule², given the limitations of a sub-thesis, this historical overview of the field is restricted to America in the 1960s. In addition to providing a useful point of comparison for analysing the character of the field in the 1990s, it is useful to analyse the policies of a nation that has such a dominating influence in global development.³

¹ See Glossary for a note on the terminology used to distinguish developing nations from developed nations.

² For example, in France, the school of thought – *le droit du développement* – developed from the law of French colonial administration (Carty 1992, p.xviii).

³ America is a powerful economic nation, and through its influence on intergovernmental organisations (ie UN, DAC), international financial organisations (ie the World Bank, IMF), and TNCs located in America, it has a considerable impact on the direction of international relations and global development.

In the 1960s America was in the midst of the Cold War. American policy makers identified the rule of law as one of the key features which distinguished the United States from the communist nations (Trubeck & Galanter 1974, p.1086). Consequently, the United States Agency for International Development (USAID) undertook to implement a number of 'rule of law' projects with the intention of transferring the American 'rule of law' to developing countries. The intention of the legal development assistance activities was to develop "rational and effective methods to protect individual freedom, expand citizen participation in decision making, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life" (Trubeck & Galanter 1974, p.1063). The culmination of these projects and the academic work that came about in response to the findings of these projects characterised the field of law and development in America in the 1960s.⁴

Law and development in the 1960s was based around the *modernisation* model of development. The modernisation model, which arose in the aftermath of colonialism, identified deficiencies in economic functioning as the cause for underdevelopment (Sittirak 1998, p.8). Development was seen as an "inevitable, evolutionary process of increasing societal differentiation that would ultimately produce economic, political and social institutions similar to those in the West" (Tamanaha 1995, p.471). Hence there was a strong focus on economic growth in modernisation theory, believing that the benefits of economic growth would *trickle down* to the more disadvantaged sectors of the economy (Sittirak 1998, p.8).⁵ The key actors who promoted modernisation theory included donor governments, such as America, Britain, France and The Netherlands, and the then newly established Bretton Woods institutions, the World Bank, and International Monetary Fund (IMF).

⁴ For an overview of this literature see Trubeck (1992), Trubek & Galanter (1974), Burg (1997), Tamanaha (1995), Carty (1992 (a)), and Merryman (1977).

⁵ Some of the criticisms of modernisation theory are outlined in the next section of this chapter – *Approaches to Development (1960-1990s)*.

The foundation theory of law and development in the 1960s was *liberal legalism*, which drew heavily from the structural functionalist⁶ perspectives popular in America in the 1960s. It is worth exploring the tenets of liberal legalism in some detail, because the assumptions underlying this theory were largely the reasons for the demise of the law and development movement in the 1970s. Understanding the problems also provides an insight into the problems with the nature of *law and development* as it has re-emerged in the 1990s. Trubeck and Galanter (1974) provide a concise and comprehensive outline of liberal legalism which I draw upon in my summary of the main elements of liberal legalism.

Liberal legalism assumed that America was a model of a functioning society and that the law was a positive requirement of such a society. Liberal legalism theorists adhered to the notion that “evolutionary progress would ultimately result in legal ideals and institutions similar to those in the West [ie a free market system, liberal democratic political institutions, and the rule of law]” (Tamanaha 1995, p.473). The law was seen as an essential instrument for establishing these legal ideals and institutions.

The State and the individual are the two key players identified in liberal legalism. The State, in its capacity as the “primary locus of supra-individual control in society” (Trubeck & Galanter 1974, p.1071), can coerce individuals. At the same time the State is seen as a process through which individuals can formulate rules for mutual self-governance (Trubeck & Galanter 1974, 1071). Individuals consent to the State’s authority in return for the State promoting individual welfare. The State uses the law to exercises its control over the individual:

⁶ Various strains of functionalism, structuralism, and structural functionalism have developed in the fields of sociology, anthropology, literary analysis and linguistics. Structural functionalism has been defined as “the theoretical approach in which societies are conceptualized as social systems and particular features of social structures are explained in terms of their contribution to the maintenance of these systems” (Jary & Jary 1991, p.633). Proponents of this theoretical approach have included Durkheim 1895, Malinowski, 1913, Radcliffe-Brown 1914, Levi Strauss 1945, Parsons 1951 (Borgatta & Borgatta 1992, pp.730-735).

Viewed through the lens of this paradigm, a legal system is an integrated purposive entity which draws on the power of the State but disciplines that power by its own autonomous and internally derived norms the social behaviour of individuals is aligned with and guided by legal rules (Trubeck & Galanter 1974, pp.1072).

An *instrumentalist* conception of law lay at the core of liberal legalism's understanding of the relationship between law and social change. The law was perceived to be an *independent* variable which could stimulate social change. By this I mean, the law was seen as instrument, which when utilised, could, in and of itself, produce social change. The law "could be molded and manipulated to alter human behaviour and achieve development" (Burg 1977, p.505).⁷

In applying the liberal legalism model to developing countries, the starting point was to compare existing legal systems in developing countries against the American liberal legalism model of law, and then identify any deficiencies and propose modifications (Trubeck & Galanter 1974, p.1077). Most often the strategies took the form of providing subsidised legal services or training and educating lawyers. This approach attracted contributions from comparative lawyers, area specialists interested in developing countries, legal anthropologists and social scientists interested in social research on law in the Third World.

In the 1970s the field of law and development collapsed, and the heavy reliance on liberal legalism as the lens for viewing society's relationship to the law was at the core of this demise. Trubeck and Galanter's article (1974) was so influential in its criticisms of law and development, that they have almost become equated with the demise of the field. Therefore I draw almost exclusively from their article in the discussion on the reasons for the estrangement. I focus here on three of the reasons identified by Trubeck and Galanter (1974).⁸ Firstly, the law and development

⁷ The terms *independent variable* and *dependent variable*, have developed a particular importance in law and development theories concerned with whether law can effect social change. See Mehren and Sawers (1992) for a fuller discussion of these terms.

⁸ For a fuller critique of the deficiencies of liberal legalism see Trubeck & Galanter (1974), Tamanaha (1995), Carty (1992 (a)), Burg (1977), and Merryman (1977).

theorists failed to question the assumptions in liberal legalism – a result of the influence of structural-functionalism. For example, the provision of subsidised access to courts in the form of legal aid was identified as a strategy for improving marginalised groups' access to the law. But the reformers failed to question whether providing subsidised legal counsel would equalise the availability of professional skills. They did not question whether the courts and lawyers were biased, or whether decisions favourable to disadvantaged groups would be ignored in practice. Under liberal legalism, these factors (eg an unbiased judicial system) were assumed to pre-exist (Trubeck & Galanter 1974, p.1076).

The consequence of not questioning the assumptions was that many of the intended outcomes were not achieved, and they failed to envisage the actual repercussions of their projects on the society (for example, a lowering in the quality of services for the poor or overburdened courts). They also failed to identify alternative paths for achieving their goals of protecting individual freedom, expanding citizen participation in decision making, enhancing social equality etc (Trubeck & Galanter 1974, p.1077).

The second reason for the demise of law and development in the 1970s was that the law and development theorists applying the liberal legalism model did not test the model against the Marxist, feminist, and critical legal study⁹ theories emerging in America in the 1960s and 70s. These emerging theories challenged liberal legalism's ideas about society's relationship to the law. Had the law and development proponents done so, they might have had some of their fundamental assumptions about society's relationship to the law challenged.

Liberal legalism was criticised in these other quarters for its assumptions of universality and its failure to recognise the systemic disadvantages of minority groups in legal systems. For example, liberal legalism's proponents operated under the belief that the legal professions represented the public interest, rather than being

⁹ D Trubeck went on to become a central figure in Critical Legal Studies in the 1970s.

the agents of a relatively narrow, advantaged segment of society (Trubeck & Galanter 1974, p.1079). Consequently, they did not foresee that in some instances the unintended effect of providing legal training was increased social inequality and reduced participation in decision making (Trubeck & Galanter 1974, p.1078). The critics of liberal legalism began asking the question - how can legal systems enable greater participation of marginalised people, when the legal model being used does not recognise the systems of discrimination inherent within the system.

The feminist critiques of liberal legalism are especially pertinent for the purposes of this thesis. Liberal legalism assumed that the law, as an institution, was inherently beneficial for all groups in society. There was no examination of how the law interacted differently with disadvantaged women. They failed to consider feminist critiques of the law, which viewed the law as a patriarchal system, which failed to provide gender justice.¹⁰

The third and definitive criticism sustained by liberal legalism, which came as a result of empirical data collected from developing countries and from the law and development projects undertaken, was leveled at its ethnocentric perspective. There was stark difference between the theory and the reality of the situations in developing countries.

The [liberal legalism] model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan and local community is far stronger. The model assumes that rules both reflect the interests of the vast majority of citizens and are internalised by them, while in many developing countries the rules are imposed on the many by the few and are frequently honoured more in breach than in the observance (Trubeck & Galanter 1974, pp.1080-81).

The law and development exercise of the 1960s began to seem little more than a paternalistic scheme of transferring American knowledge to the developing

¹⁰ Feminist criticisms of the law are outlined further detail in Chapter Three – *Women and Law in India*.

countries, with very little understanding of the issues and needs of the developing countries themselves. Trubeck & Galanter termed the resulting demise of the law and development movement in America *the self-estrangement of law and development*. Following the heavy academic criticism of the law and development field, USAID funding for law and development projects decreased and the law and development literature in America went into retreat during the 1980s.¹¹

Approaches to Development (1960s–1990s)

At the same time, in the field of development itself, similar criticisms were being made of liberal legalism's counterpart, modernisation theory. The practical experiences of non-governmental organisations (NGOs) and academics working in developing countries and the experiences of local development groups in developing countries attacked the fundamental elements of modernisation theory by showing that economic growth did not necessarily trickle down to the most disadvantaged sectors of society. Despite the increases in Gross National Product (GNP) per capita in many developing countries, these statistics did not always reflect the plight of the poorest of the poor (of whom women were a large proportion), whose lives often lay beyond the reaches of the formal economy. In fact some contemporary criticisms of the economic growth model argue that rather than alleviating poverty it has perpetuated poverty:

Poverty is no more an absence of economic growth; and poverty and growth are [two] sides of the one coin. The very structure which produced prosperity for the few also produced poverty for the many (P C Joshi, "Social Action With The Poor", *Report of the National Seminar in Social Action With the Poor*, National Institute of Public Co-Operation and Child Development, 1982, p 5, quoted in Gandhi 1985, p.3).

¹¹ Tamanaha (1995) points out that although America did cease, other donors (France, ODA) continued to work in the area. Scholars in many of the developing countries (ie the Latin American countries and India) also continued to develop legal systems in their countries in accordance with western models. Tamanaha comments that the practitioners on the ground did not have "the luxury of eclectic critique" (Tamanaha 1995, p.474).

Whereas in *law and development* there was little response to the criticisms, in *development*, a range of *alternative theories* arose in response to the criticisms. *Dependency theory* was one of the key alternative theories to emerge. Based on a Marxist analysis, dependency theory argues that the sources of under-development lie in the history and structure of the global capitalist system (Tamanaha 1995, p.477). Under a global capitalist system, developed countries exploit the natural resources and labour of developing countries thereby restricting developing countries from 'competing in the market' (Tamanaha 1995, p.477). The production of developing countries becomes geared to the demands of the world market (Wilber & Jameson (1988) referred to in Sittirak 1998, p.15), creating a relationship of Dependency between the developed and the developing economies. Local elites and government officials in developing countries form class alliances with western governments to gain access to the potential sources of wealth under the global capital system (Tamanaha 1995, p. 477), often at the detriment of the rural poor and urban slum dwellers of developing nations. The result according to Dependency theory is a class-based system of development, where one group (developed countries) develop on the strength of the other classes' (developing countries) resources. According to dependency theory, the law is used by developed countries and local elites/government officials in developing countries, to perpetuate the power relations that establish their supremacy in the class hierarchy.¹²

Other alternative theories focused on development being a process which needs to be based in a *grass-roots approach*. The grass-roots approach contended that for sustainable development to occur, development must be localised, *basic needs* (eg food, water clothing, medical care) must be the priority, and change must be developed and implemented by the people most affected by the changes. This required a shift towards *people-centered* development, which involved the people who were intended to benefit from an activity, to be the central participants in the

¹² Dependency theory is influenced by Marxist theory so sees the law as part of the superstructure to the economic base and therefore having a secondary role (Tamanaha 1995, p.479).

design, implementation, and evaluation stages of the activity.¹³ This shifted the focus in development from measuring economic growth to identifying *who* benefited from development programs.

Human development is not measured just in terms of growth in national income – what matters, too, is the kind of growth: what it consists of, how it is achieved and who benefits from it (United Nations, *Seminar on the Relations That Exist Between Human Rights, Peace and Development*, UNO, New York, 3-14 August 1981, quoted in Pandey, 1997, p.537).

Another important shift caused by focusing on the question *who benefits* was a greater examination of people's rights, and particularly women's rights, in the development process. For instance, the definition of human development objectives (which used to be defined in terms of meeting the basic human needs such as nutrition, health, housing, education and other social services) has since been broadened to include issues of peace, justice and human rights (Pandey 1997, p.537).

I briefly divert here to show that similar theoretical changes were also taking place in India, primarily among the voluntary organisations,¹⁴ during the 1960s and 70s. Until the 1960s eighty percent of voluntary organisations in India had a Gandhian or church related base, and focused on relief (ie satisfying the immediate needs of people) or on programs in institutions such as schools and hospitals. The aim was the economic improvement of the poor. These efforts were fed into India's Five Year Plans, which were driven by a modernisation approach to development and an accompanying focus on economic growth.

In the 1970s, some voluntary organisations began to question the negative impacts of modernisation. In accordance with a dependency theory approach, poverty came to

¹³ The people-centered approach to development was reflected in the Nairobi Forward Looking Strategies for the Advancement of Women which stated: "Development strategies and programmes ... need to be designed in a manner that fully integrates women at all levels of planning, implementation, monitoring and evaluation in all stages of the development process ... to ensure that women receive proper benefits and remuneration commensurate with their important contribution in this field" (quoted in Waring 1996, pp. 56-57).

¹⁴ See Glossary for an explanation of the use of this term.

be seen as result of oppressive social structures that marginalised weaker sections of society, rather than just as a result of a lack of economic inputs. Thus development began to be seen as a process of building awareness and liberating the weaker segments of society, to enable them to become active agents in developing and changing their society. For example, voluntary organisations began addressing the structural and political processes inherent in the legal system, which worked to deny the poor access to resources and the benefits of development (Fernandes 1986, pp.2-5). This approach is akin to the people-centered approach to development I outline above.

The focus in this first chapter has so far been on examining the history of law and development in America in the 1960s, and the reasons for its self-estrangement in the 1970s. This historical context of law and development, together with the brief overview of alternative development theories, provide a backdrop against which the characteristics and problems of law and development in the 1990s can now be examined and assessed.

1.2 Law and Development in the 1990s: The Economic Approach

Although the criticisms of law and development in the 1970s led to a retreat in the academic literature on law and development, it did not lead to the extinction of the field of law and development. In the 1990s the intellectual debate on law and development has re-emerged under the direction of powerful institutions such as the World Bank, IMF, Asian Development Bank (ADB), ASEAN, TNCs, and donor countries such as America.¹⁵ Today these institutions are promoting law and development projects for the purposes of establishing global legal standards in developing countries. The intention of setting these standards is to enable developing countries to participate in the global trade liberalisation frameworks. The law and development field in the 1990s is dominated by this approach, which I term

¹⁵ See Otto (1997) for a discussion of the reasons for the emerging partnership between capitalist institutions of the North and the new economic systems emerging among the *Asian States*, which we see here.

the *economic approach*. The following analysis of the economic approach highlights the criticisms of this approach, arguing that the economic approach is too narrow and principally that this approach fails to effectively incorporate women.

The new international economic agenda is based on the establishment of a series of global and regional agreements on trade and investment liberalisation (eg APEC, WTO), which are intended to stimulate economies internationally. There are a number of barriers for developing countries wanting to participate in this new international economic system. One such requirement is that they must demonstrate the capacity to have enforceable legal systems. In many developing countries the legal systems are comparatively weak because of the lack of enforcement of the rule-of-law by the citizens and the State. Gray cites corruption, delays and the unpredictability of judicial institutions in these countries as examples of the weakness of the legal systems (Gray 1997, p.14). For example, in India, as of May 1997, there were 3.1 million cases pending in the various high courts in the country (as posted to the email list: India News Network Digest 1997, vol.2). Gray goes on to comment that the consequent reliance on informal systems (where business is done only with known parties) also forms a barrier for developing countries wanting to participate in international free trade and investment schemes (Gray 1997, p.14).¹⁶ Gray concludes that if a dense and efficient network of commercial relationships is to flourish in an economy, this requires a “credible and low-cost formal legal process [for] aggrieved parties” (Gray 1997, p.14).

Many of the major proponents of law and development in the 1990s, including the World Bank, the IMF, ADB, APEC, ASEAN, TNCs, and donor countries such as America, are promoting law and development projects to strengthen the legal systems in developing countries for the purposes of entering the new international economic system. Consequently, these law and development projects adopt a strong (almost exclusive) economic perspective in their analysis of legal systems. For

¹⁶ For a discussion on why relying on such informal legal systems may not be such a disadvantage see Milhaupt (1996, pp.3-64). He argues for instance that informal systems based on familial connections have been effectively used in the financial and commercial spheres in Japan.

example, the World Bank limits its focus on legal systems to property rights because it identifies property rights to be the foundation for market-led growth and poverty reduction (World Bank 1997, p.45).¹⁷ Similarly, within academia, writers such as a Cooter (1997), Buscaglia (1997), and Gray (1997) elaborate the same law and economic perspective, arguing that efficiency in legal systems is an essential component of economic development.¹⁸

Legal reform in general and property rights in particular are essential if Latin American countries are to develop national market economies that can participate in the world market economy (Buscaglia 1997, p.xv).

A myriad of law and development projects have emerged¹⁹ which aim to provide a 'rule-of-law' in developing countries which will provide for the economic and commercial transactions necessary for participating in the new international economic agenda.²⁰ For example, The ASEAN Business Law Program (March 1997) is designed to give participants an understanding of the main features of economic laws in each of the ASEAN countries. The intention is to improve the standard of legal advice in ASEAN countries on business transactions (as posted to the email list: law-dev@iphil.net, 1997).

Given the limits of this sub-thesis I will focus my analysis of the economic approach to the actions of two of the key players – the World Bank and the IMF. They have been two of the most active agents in promoting legal system projects in developing

¹⁷ The 1997 *World Development Report* by the World Bank identified law as one of the five crucial ingredients for sustainable, shared, poverty reducing development. The other four ingredients identified included: a benign policy environment, including macroeconomic stability; investment in people and infrastructure; protection of the vulnerable; and protection of the natural environment (World Bank 1997, p.41). This five pronged approach provided the Bank with the option of examining a range of impacts of legal systems that go beyond looking at the impact on the commercial sphere. But the Bank chose to limit its examination of the impacts of securing a strong legal foundation of law to property rights.

¹⁸ In another example of the economic and law approach, this time applied to civil society, Buscaglia (1997, p.5) argues that civil society's market and non-market norms for social interaction need to be reflected by public institutions and transformed into legal rights and obligations, in order to decrease the transaction costs of human interactions, and therefore move towards a more efficient legal system and market economy.

¹⁹ Not unlike the rush of law and development projects that emerged from USAID in the 1960s, in response to the threat of communism, and the need to establish democratic legal systems.

²⁰ The OECD DAC has commented that of all donors, the United States has provided the largest proportion of development assistance for legal systems (DAC 1996, p.21).

countries for the purposes of economic globalisation. I focus primarily on the World Bank and where possible I demonstrate the parallel issue in relation to the IMF.

The World Bank's interest in law and development in relation to economic globalisation emerged from the shift in the World Bank's approach to development, which took place in the 1970s. Previously the World Bank had a modernisation view of development and so perceived underdevelopment to be a consequence of a series of economic constraints which required massive increases in domestic investment and relied largely on the State. In the 1970s the World Bank's analysis changed to show that the economic constraints were distorted consequences of misguided state intervention, which could only be overcome by a greater reliance on the market.²¹ So the Bank's policy shifted from excessive state intervention to minimal state intervention and the freeing of market forces to ensure an efficient use of resources. This shift in policy meant a new interpretation of the role of the State in the process of development – a much more limited state that is market friendly. The Bank envisioned that the State should follow the market rather than dictate to the market.

The World Bank implemented this policy change by making comprehensive state reforms a condition of its loans (and the IMF adopted a similar strategy with its structural adjustment programs). These state reforms included deregulation of investment, prices and production, liberalization of trade and the financial sectors, privatization of public enterprises, labour market reforms etc (Faundez 1997, pp.7-8). To complement the State reforms, the World Bank's law reform programs focused on areas of commercial law; private property rights; and management of case loads to improve efficiency in the settlement of commercial disputes via speed and predictability (McAuslan 1997, p.27).²²

²¹ This capitalist focused analysis stands in contrast to the criticisms dependency theory makes of modernisation theory, which I discussed earlier in this chapter.

²² In the *1997 World Development Report*, the Bank reverted its position on state reform and recognised the importance of a strong state for development: "...development requires an effective state, one that plays a catalytic, facilitating role, encouraging and complementing the activities or private businesses and individuals ... History has ... shown that good government is not a luxury but a vital necessity. Without an effective state, sustainable development, both economic and social, is impossible" (World Bank 1997, p.foreward). Orford and Beard (1998) criticise this rhetoric, arguing

The World Bank has stated that the reason it has maintained such a strong economic focus is because the Articles of Agreement for the Bank prohibit it from intervening in the political situation of any member state. The Bank's Articles of Agreement state:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions (cited in Cogen 1992, p.380).

The IMF Articles of Agreement do not contain a similar provision, but Article IV section 3(b) of their Articles says: "These principles shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members" (cited in Cogen 1992, p.380).

On the basis of these provisions, both financial organisations have worked out similar policies of political non-intervention into the domestic affairs of a member state. The Bank is very clear that it may "not be involved in financing legal reform activities that do not have a direct and obvious link to economic development" (quoted from *World Bank Technical Assistance: Initial Lessons*, Policy Research Working Paper 1414, in McAuslan 1997, p.27). This non-intervention policy is where the World Bank and IMF derive their narrow economic focus for law and development.

Criticisms of the Economic Approach

Critics have claimed that the economic approach, by focusing on economic growth, provides a very narrow perspective for law and development. A range of other aspects of development, including democracy, human rights, good governance, civil

that the Bank still retains its commitment to privatisation and state restructuring. "The 1997 report makes clear that the role of the State and public institutions should be limited to creating an environment that supports a free market and provides security for foreign investment" (Orford & Beard 1998, p.202).

society, and women's issues, consequently fail to be considered. In this section I analyse four main criticisms of the economic approach: the World Bank / IMF's non-intervention policy; the limitations of an economic perspective; the inheritance of colonialism; and feminist criticisms.

The World Bank / IMF's Non-Intervention Policy

The previous section in this chapter outlined the World Bank and IMF's reasons for focusing on economic development and adopting a policy of non-intervention on political issues. However, Orford and Beard (1998) argue that, in spite of the restrictions of their Articles of Agreement, the World Bank and the IMF do intervene on a policy / political level in developing countries.²³ They intervene through the imposition of conditions on access to credits and loans by requiring alterations to domestic policies in areas such as foreign investment deregulation, privatisation, and cuts to government spending on health and education (Orford & Beard 1998, p.197). They also intervene through debt rescheduling. For example, the IMF plays a central role in arranging for private banks to participate in coordinated lending packages, on the proviso that the lending package meets IMF conditions, which will guarantee stable economic policies in the debtor country. In these ways, major creditor governments and multilateral institutions use debt as an instrument to impose policy on developing countries (Orford 1997, pp.466-467).

The World Bank and IMF veil such intervention under the guise of an economic cloak and simultaneously fail to acknowledge or deal with the impact of their political / policy intervention in developing countries. Orford and Beard (1998) criticise the World Bank for taking this approach because such intervention can undermine the democratic process in developing countries. Aspects of what were once understood to be sovereign issues, which rested with the people and their

²³ In 1987, the Bank's legal counsel moderated the Bank's stance to the extent of recognising, "political events which have a bearing on the economic conditions of a member, or on the member's ability to implement a project or the Bank's ability to supervise the project may be taken into consideration by the Board" (Cogen 1992, p.383). But as Orford (1997) demonstrates with the example of Yugoslavia this has not meant much change in practice.

elected representatives, are placed into the hands of international economic experts. Local interests which are sacrificed can include: participation in decision making; maintaining labour standards; environmental protection; self-determination; access to information and education; equity; and the maintenance of sustainable food production (Orford & Beard 1998, pp.198, 200). Many of these local interests being sacrificed impact especially on disadvantaged women in developing countries (eg equity, access to education, sustainable food production). Under the economic approach, the current direction of the World Bank and the IMF could result in market reforms being introduced at the expense of democratic reforms.

Orford argues that the World Trade Organization (WTO) could further entrench this trend by establishing an international economic framework, which favours States and TNCs over local peoples and communities. For example, many social and economic rights for the provision of public goods and services are based on concepts of equality and citizenship which imply power sharing, claims to resources and entitlements against the State. Under the process of investment liberalisation and privatisation, the guarantee to individuals of formal equal access to public goods and public decision making is replaced by market rules, where egalitarianism has no role (Orford 1997, pp.473-474).

Another consequence of the policy of non-intervention on political matters is that neither the Bank nor the IMF consider the human rights implications of their interventions. Both financial organisations argue that they are not signatories to any human rights instruments and so have no obligations under these instruments.²⁴ Furthermore, both organisations argue that human rights, especially civil and political rights, are political issues and therefore subject to the policy of non-interventionism. What they fail to recognise is that the protection of human rights is an important component of development. For example, currently there is a legislative requirement in India for Dalits to be provided employment reservations

²⁴ Tomasevski (1989) and Cogen (1992) have argued that both organisations are obligated to promote human rights. One of the reasons they state is that the World Bank and the IMF are part of the UN system and are bound by the UN Charter, which proclaims the promotion of human rights as one of the main purposes of international cooperation (Article 56).

within the public sector. This provision would be substantially threatened under any World Bank / IMF policies for public sector reform to downsize, streamline. The removal of affirmative action strategies such as this could contribute to a greater imbalance of rights for Dalit, leading potentially to widespread civil unrest in India (Mallick 1997, p.242).²⁵ This example demonstrates that by failing to include human rights issues, the concept of *development* is limited because it fails to consider the impact on marginalised groups.

Limitations of an Economic Perspective

Mehren and Sawers' (1992) use the example of land titling in Thailand to examine the economic benefits of law and development. Mehren and Sawers make the argument that the introduction of legal land titling systems has contributed to the economic development of Thailand's agricultural sector. I do not contend that Mehren and Sawers are misplaced in their analysis or that their conclusions are problematic. However, I identify two problems with their approach and these contentions relate to the economic approach to law and development more generally as well.

Firstly they rely on economic development as the underlying measure of development for their analysis of law and development. As has already been discussed in this chapter, the focus on economic growth as a measure of development is very limited, particularly in terms of recognising the impact for women. Secondly, Mehren and Sawers' analysis of the impact of the legal system does not address how the impact might vary between different sectors of society, and so there is no analysis in their work on *who* benefits from the development. For instance, their article does not explain whether the economic benefits of titling were shared equally by women and men, or whether disadvantaged groups were equally able to access the benefits of

²⁵ This example is comparable to the example of the IMF's role in Yugoslavia as analysed by Orford (1997).

land titling.²⁶ Nor do Mehren and Sawers address the common criticism made of land reform processes – that they actually *reduce* women’s control over land, by failing to recognise women’s traditional use-rights and giving sole possession of land titles to male heads of households (Sen & Grown 1987, p.34).²⁷ The narrow economic focus Mehren and Sawers adopt precludes them from examining the developmental impacts on marginalised groups such as women.²⁸

The Inheritance of Colonialism

The problems with the economic approach are particularly important in the light of the history of how colonial powers have used law as an instrument to rule over colonised nations such as India.²⁹ Examples of this have included establishing exploitative trading relations, land seizures, and introducing concepts of public order and administration, all of which were intended to be incapacitating (Greenberg 1992, p.99-105). On this point Carty argues that “the West, in particular England and France, have torn apart the political and economic structures of Third World societies and *used their legal systems to do so*” (Carty 1992(a), p.xiii).

Even in post-colonial times the law has had an insidious impact on development, both as a continuing influence in post-independent nations and in terms of creating a relationship of dependence between countries in the first and third world. In the same vein, in the contemporary field of law and development, we can see the law being used to dominate over domestic systems. The current legal development projects aim to ensure an appropriate legal environment is developed in India, for the purposes of economic globalisation. It is likely that domestic commercial

²⁶ The only concession Mehren and Sawers make is to identify that the benefits were focused in those geographic areas where commercial agriculture was a viable option (Mehren & Sawers 1992, p.89).

²⁷ See Agarwal (1994), Saradomani (1994), and Devi (1994), for discussions on the difficulty women in India face with property ownership.

²⁸ The discussion of the rights-based approach to law and development in Chapter Two identifies other areas of law and development that would benefit from a feminist analysis.

²⁹ Subaltern theorists, including Ranajit Guha 1988, Dipesh Charabarty, and Gayatri Chakravorty Spivak 1988, have discussed at some length the uses of law in colonisation: “Law plays a constitutive role ... in defining the colonial subject, and given the connection between the knowledge and power,

arrangements or legal arrangements not consistent with the international requirements will be relinquished, with comparable impacts on the domestic legal system as occurred under colonial rule.

Feminist Criticisms of the Economic Approach

I noticed and I listened ... because international law and the law of human rights on gender is about silences. That was what I was listening for. And the silences were overwhelmingly what I heard (Waring 1996, p.123).

I draw from Waring's experience of silences to talk about the silences on gender issues in the economic approach to law and development, and the silences are just as deafening. As outlined in the introduction this sub-thesis does not have the capacity to provide a comprehensive feminist analysis of the economic approach, but it does identify some areas where further feminist analysis would be useful.

When we start from the perspective of poor Third World women, we give a much needed reorientation to development analysis. It focuses attention again on the related problems of poverty and inequality, and forces recognition of forgotten sections of the population...(Sen & Grown 1987, p.24).

Women constitute the majority of the poor, the under-employed and the economically and socially disadvantaged in most countries (Sen & Grown 1987, p.23). Sen and Grown (1987, p.23) in their analysis of development from a feminist perspective argue that approaching development from the perspective of disadvantaged women creates a unique intervention into the economic growth versus people-centered development debates, which were outlined earlier in this chapter.

Sen and Grown's central thesis, which is representative of a range of feminist literature on development, is that women's experiences with processes of economic

in legitimating dominant distributions of power" (Spivak cited in Otto 1996, p.351). Subaltern approaches to the law, particularly international law, are discussed by Otto (1996).

growth, commercialisation, and market expansion are determined by both gender and class. Existing economic, social and political structures in many developing countries, including India, are often the historical legacy of colonial domination, and tend to be highly inequitable on the bases of class and gender. These gender-based systems of subordination can limit women's access to economic resources and political participation (Sen and Grown 1987, p.26). Most processes of economic growth do not address these barriers women face in development. In fact, many economic growth measures serve to reinforce the economic subordination of women and thereby contribute to the deprivation of women's basic needs, including access to health, education, housing, water, energy, sanitation etc (Sen & Grown 1987, p.28). Given the reliance of the economic approach on the economic growth model of development, these criticisms can be equally applied to the economic approach to law and development.

The economic approach, by focusing on the formal economy, fails to consider the needs of disadvantaged women who do not participate in the formal economy. 93 per cent of women workers in India work in the informal sector (SEWA (a) n.d., p.1). Generally these women's contributions are not counted in the Gross Domestic Product used to assess economic growth (Waring 1996).³⁰ The World Bank's focus on property rights does not address the issue that most disadvantaged women in India do not own, inherit, or manage any land. Many disadvantaged women in India rely on their husbands, or male members of their husband's family to conduct any business transactions. Therefore any law and development project, which looks at simply strengthening the economic context for business transactions, does not include the needs of marginalised women.

³⁰ Waring (1989, 1996) makes this argument in her analysis of the United Nations System of National Accounts (UNSNA). The UNSNA are used by the UN to appraise regional development programs, by the World Bank and IMF to determine the basis of countries' need for aid, and by TNCs to decide which countries to invest in. The UNSNA is based upon measuring a country's per capita gross domestic product, which does not include much of the informal activity undertaken primarily by women. The final document of the United Nations Decade for Women closing conference, held in Nairobi in 1985, addressed this issue: "The remunerated and...the unremunerated contributions of women to all aspects and sectors of development should be recognized, and appropriate efforts should be made to measure and reflect these contributions in the national accounts and economic statistics and in the Gross Domestic Product" (quoted in Waring 1996, p. 51).

In relation to women's human rights under the economic approach, institutions such as the World Bank and the IMF, by choosing to ignore the human rights implications of their loans and projects, do not ensure that women's rights to participate in development are met. In fact Agnihotri and Mazumdar (1995) contend that the macro-policies, imposed by bodies such as the World Bank increase inequalities among people, making the conditions for women already struggling for survival even more difficult and contributing to situations of social turbulence and violence, in which women more often than not are the victims (Agnihotri & Mazumdar 1995, p.1876). Studies of structural adjustment programs have demonstrated these negative effects on marginalised women.³¹ In 1988 women's organisations from around India came together and made a joint statement to draw attention to these problems.

We say no ... to GATT, we oppose the unrestricted entry of TNCs into the Indian economy ... discussions on the impact of the economic policies usually focus on the impact on the organised sector, since women make up only a small percentage here it is assumed that the impact is minimal. [But], in our multi-dimensional roles as workers, as peasants, as producers, as citizens, as mothers, as wives, daughters, as women, the economic policies hits us the hardest (Joint Press Statement by National Women's Organisations July 6, 1988, quoted in Agnihotri & Mazumdar 1995, p.1876).

The impact of the economic approach is that legal systems in developing countries are being strengthened in a way that does not create any interventions specifically for women. This is problematic in the light of the fact that in most developing countries, the law operates as a patriarchal system, which does not always address the needs of women or provide gender justice.³²

³¹ Agnihotri & Mazumdar (1995) cite the works of academics such as Krishanraj 1988, Patnaik 1993, Krishnamurty 1989, Ghosh et al 1994 and Mitra 1979 to argue that the impact of SAPs in India, by removing many of the regulatory and compensatory aspects of India's mixed economy, have enabled global market forces to become the sole players in the field. Agnihotri & Mazumdar argue that this situation resembles the impact of colonial rule on India's economy and women's role in the economy.

³² See MacKinnon (1989) whose arguments against liberalism have been key in the evolution of a feminist dialogue on the patriarchal nature of the law and the State. MacKinnon argues that the State intervenes on behalf of women as abstract persons with abstract rights while in reality the State is male in the feminist sense. By this she means that the State universalises the male experience of rights and provides no distinct recognition for women's rights within that view. MacKinnon's arguments have been influential in questioning the position of neutrality and objectiveness assumed

1.3 1960s – 1990s: How Far Have We Really Come?

On the surface the similarities between the law and development movement of the 1960s and the current economic approach to law and development, as promoted by players such as the World Bank and IMF, are apparent. As the criticisms of the economic approach outlined in this chapter illustrate, the economic approach continues to rely on liberalist notions of the law (Faundez 1997, p.13). Like the law and development movement in the 1960s, the economic approach continues to focus on the economic growth model of development. Furthermore, the global economic agenda driving the economic approach contains an ethnocentric homogenisation similar to the ethnocentric approach in the 1960s. In this sense the economic approach in the 1990s has failed to learn from the lessons of law and development in the 1960s.

However, there are some critical differences as well. One key difference is the shift in the concept of the State. In the 1960s the State was seen to be the central body initiating and promoting economic development, and it used the law where possible to do so. In the 1990s, the State is seen as a market friendly state. The State acts as a facilitator for the market and the market is the central stimulator for economic growth. Thus rather than law being a protagonist for economic and social change it becomes a more passive facilitator, a dependent variable (Faundez 1997, pp.13-14).

The other major difference is that law and development in the 1960, on the basis of viewing the law as an independent variable for social change, proposed a comprehensive and centralised legislative reform process. In contrast Cooter (1997) argues for a decentralised approach to law making in the 1990s. That is to say, norms are understood as mechanisms for coordinating social interaction. The efficiency of both the legal system and the economy is enhanced by a bottom-up

by the law in relations to women's experiences. These arguments are located in the Indian context in the discussion of the contemporary Indian women's movement in Chapter Three. Chapter Four raises some of the criticisms made against MacKinnon for her limited recognition of women's experiences as constructed by other influences including caste, class, race etc.

process of capturing existing social norms that are informally relevant in human interactions (Cooter 1997). This is consistent with the view 1990s view of law being a dependent variable.

The third area of difference is an area described in Chapter Two – the *rights-based approach* to law and development in the 1990s. The rights-based approach promotes a much broader approach to law and development than the economic approach. With a rights-based approach in the 1990s, we see an incorporation of the alternative theories of development (outlined earlier in this chapter) based on participation and equity. There is also a greater scope for incorporating issues of democracy, civil society, good governance, and the recognition of women's issues. This fundamental shift can create new possibilities for the involvement of women in law and development in the 1990s, in a way which was not possible in the 1960s.

2. THE RIGHTS-BASED APPROACH TO LAW AND DEVELOPMENT

In response to the criticisms of the economic approach outlined in Chapter One, in Chapter Two, a broader approach to the field of law and development is presented, an approach that extends beyond economic growth being the exclusive reference point for development. I term this alternative approach, the *rights-based approach*. The rights-based approach is based on the promotion of human rights and draws concepts of democracy, civil society and good governance into the field. This approach has arisen primarily from the experiences of NGOs who advocate for people's rights and their participation in, and benefit from, a sustainable development process. The rights-based approach is contrasted against the economic approach, demonstrating the role democracy, civil society, and good governance can play in law and development. The analysis explores some feminist criticisms of a rights-based approach but concludes that, in spite of the criticisms, this approach still provides law and development with a means to achieving a more equitable, sustainable development for all, including women.

2.1 Human Rights in Law and Development

One of the main ways in which *rights* have been linked with development is through international human rights law. This regime of law specifies the application of legal obligations, as outlined in human rights instruments,³³ upon the conduct of governments (donors and recipients) and intergovernmental agencies. These obligations are applicable to any government activity, including development. All governments are obliged to recognize and observe universal human rights standards, to the extent that they have agreed to do so.³⁴

³³ In addition to the formal human rights instruments, customary international law can also place obligations on Governments.

³⁴ See Appendix 1 for a list of human rights instruments ratified by the Indian Government.

However, traditionally, the link between human rights and development has not been very strong. There is no United Nations policy on human rights in development. Some UN specialised agencies (ILO, WHO, UNESCO) include human rights in their mandates and assistance programs, but there are others such as UNDP, financial and trade agencies, multilateral and regional banks, who do not mention human rights (Tomasevski 1989, p.17). As discussed in Chapter One, the World Bank and the IMF have been criticised for not including human rights in their policies and programs. One of the main reasons for the limited recognition of human rights in the development field has been the influence of the economic approach, which has distanced itself from anything political, including human rights.

The policy of human rights bodies is different from that of organs for economic and cooperation and trade. Human rights are totally marginalised or eliminated from economics, trade and finance (Tomasevski 1989, p.18).

Some of the obstacles to the inclusion of human rights by bilateral donors include the prevailing dominance of economics in the design, planning and evaluation of aid, the prevalence of foreign policy interests (Tomasevski 1989, p.18), and the political limitations of bilateral agreements between donor and recipient governments.

The schism between human rights and development has at times been so great that bodies such as the Commission of Human Rights, WFP, ILO some NGOs and some UN human rights bodies, have queried whether development cooperation may in some occasions be detrimental to the protection of human rights. This was an issue in development projects such as the Narmada Valley Project in India where the protection of over one million people's rights in relation to their displacement (and related economic, social, and cultural deprivation and upheaval) was threatened for the economic benefit of the country (Alvares & Billorey 1988, p.1).³⁵ In response to this schism between human rights and development Tomasevski (1989) has argued that it is

³⁵ See Alvares & Billorey (1988), Singh (1992), Paranjpye (1990), The Ecologist (1992).

important to look not just at the human rights implications of development, but to also examine how human rights can be actively promoted in development.

Human rights can provide a useful base for combating underdevelopment. Human rights lawyers like Orford (1998), Alston (1998), Tomasevski (1989), and Dandan (1995) recognise this, and are directly challenging the unfortunate practice of keeping the field of human rights law distinct from economic development. Tomasevski (1989, p.30), for instance, argues that every component of the United Nations (including multilateral banks, but notably not TNCs) is obligated to observe human rights law, so human rights must be an integral part of development.³⁶ Similarly, Dandan (1995, p.58) argues that development can not be limited to economic growth, because economic growth is only one of a range of tools to achieve development, which is ultimately about the values of freedom, equality, participation, solidarity and diversity.

The basic advantage of human rights, are that they provide citizens with a basis for ensuring that the State does not ignore or harm their interests. For example Mohanty ((1991 (b)) argues that women's reproductive rights have always been mediated by a coercive state. Human rights can provide an avenue for women to limit such coercion by the State to ensure that state intrusion is done in a beneficial way. The importance of using human rights in this way is reflected in that in one of the four main concerns of third world feminists has been "the role of a hegemonic state in circumscribing [women's] daily lives and struggles" (Mohanty 1991(b), p.12).

Two other advantages of linking human rights to development are outlined below.³⁷ One advantage is that the recognition and enforcement of an individual's or group's

³⁶ The possibility of international financial institutions explicitly addressing human rights issues in their lending policies has been realised under the recently established European Bank for Reconstruction and Development, whose preamble states that the Bank is "committed to the fundamental principles of multi-party democracy, the rule of law, respect for human rights and market economies" (Cogen 1992, p.390).

³⁷ For a discussion of some of the other advantages of linking human rights with development, (eg a greater focus on government's obligations; feminist critiques aside, the notion of equality in human rights leading to more equitable development; a human rights perspective imbuing participation with more force), see Human Rights Council of Australia (1995).

human rights³⁸ can take the issue beyond the personal level to a socially, politically enforceable realm (Arat 1991, p.5). For instance, within the discourse of religion, a Dalit woman could only explain away her marginalisation in terms of: “Such is the wish of God that I have the disadvantages of my caste”. Comparatively, under a human rights discourse, she might express her position in terms of: “This act of discrimination against me is on the basis of my caste. That is a violation of my human rights which I can address under the law.”³⁹

... the assertion ... of rights can express political vision, affirm a group’s humanity, contribute to an individual’s development as a whole person and assist in the collective political development of a social or political movement (Schneider 1986, p.590).

Another benefit of linking human rights to development is, as Orford and Beard (1998) suggest, that international human rights law can provide citizens with the means to challenge the State’s implementation of World Bank or IMF policies (Orford & Beard 1998, p. 215). For example if the Bank’s loan conditions require expenditure cuts in the social sector, the citizens can argue that the cuts will undermine the ability of the State to uphold its obligations to protect their human rights (eg right to education, health).

Despite the potential advantages the human rights discourse may offer development, one must be aware of the criticisms of the discourse, and it has received considerable criticism since its inception.⁴⁰ The primary criticism has been the weakness of its enforcement capacity in relation to States, international monetary institutions, and TNCs. Critical legal scholars among others have also questioned the efficacy of the human rights discourse in addressing the systemic issues affecting marginalised and disadvantaged people because of the formalistic and individualistic nature of rights (referred to in Kapur & Cossman 1986, p.286). Some have criticised the negative nature

³⁸ See Alston (1998) for a discussion of human rights being applicable for individuals and groups.

³⁹ This example is not intended to polarise the discourse of religion against the rights discourse. The human rights discourse has been used to both inform and promote religious beliefs. Article 18 of the UDHR (right to freedom of religion) is an explicit instance of the positive interaction of the two discourses.

⁴⁰ Criticisms of the human rights discourse from a feminist perspective are outlined later in this Chapter in – *A Feminist Analysis of the Rights-Based Approach*.

of rights, which may in instances be useful for restricting State power, but do not as easily contribute to conferring positive benefits. Another common criticism is that there is an unresolved contradiction in international human rights law between conceptions of human rights as either inherent in human beings by virtue of their humanity or as benevolently granted by the State. Alston (1998) however, resolves the contradiction by arguing that all rights do not have to derive from the same justification, but that human rights can be another layer of the legal pluralism. Thus he is able to reconceive human rights in a more positive light, as a flexible tool.

[Human rights can be part of an] overlapping consensus which is capable of being affirmed by opposing philosophical doctrines ... The precise nature of a given claim would still have to be evaluated in the light of (this) pluralistic approach (Alston 1998, pp. 31,33).

Many African-American activists have countered the position that human rights discourse should be discarded by arguing that in spite of the problems with the rights discourse it remains a powerful tool, especially for those people who have never had rights. "Rights feel new in the mouths of most black people ... it is the magic wand of ... inclusion and exclusion, of power and no power ... it is the marker of our citizenship, our relation to others" (Williams 1991, p.164).⁴¹ Similarly Schneider (1986) has also argued that the human rights discourse has a considerable symbolic power that can be usefully harnessed for social change.

Despite the drawbacks inherent in the human rights discourse, it nonetheless provides a valuable basis for a rights-based approach to law and development, which enables law and development to have a more equitable and sustainable approach. But in saying this it must be noted that the rights discourse is only useful as a tool for social change where the limitations of rights discourse are recognised and addressed (Kapur & Cossman 1986, p.289). Importantly, a rights-based approach also contributes to the presence of democracy, civil society and good governance in law and development, which is what I

⁴¹ Williams' approach is an example of the *transformative critiques* of human rights which raise "local expressions of dissent that are erased by the dominant debate" discussed by Otto (1997, p.3).

explore in this next section of the chapter. An interesting feature of this is that the proponents of the economic approach also discuss these issues but with differing aims, an aspect that is elaborated on.

2.2 Democracy, Civil Society, and Good Governance in Law and Development

Democracy

The percentage of formally democratic states in the world has grown from 25 per cent in 1973, to 45 per cent in 1990 to 68 per cent in 1992 (Leftwich 1996, p.3). Although democracy is coming to be seen as a necessary condition of development, the tension between democracy and the other goals of development (ie growth, stability, equality and autonomy) are resolved differently by the two approaches. The economic approach prioritises growth, but the rights-based approach creates the opportunity for the other goals of development to be addressed as well. The tension between the different approaches to democracy has become embedded in distinctions between what is termed a *western democracy* and other forms of democracy.

Broadly defined, democratisation can mean providing opportunities for participation in the political life of a country. But what has come to be recognised as the most prevalent democratic system in contemporary times is the *western* or American model of democracy, which contains such features as periodic free⁴² and fair elections, a pluralistic civil society, free media, a recognised opposition in parliament, and market oriented development (ie capitalism).⁴³ Inherent in this western concept of democracy is the equation of democracy with the concept of market reform under the economic and political liberalisation movement. The underlying assumption here is that the western market democracies can be mimicked in developing countries through policy

⁴² This concept of *free* in the western model fails to address the economic costs of elections and media which limit the participation of many citizens.

⁴³ See Trend (1996) for discussions of alternative models of democracy, based on the literature of *radical democracy*, that critique the American model of democracy.

intervention alone, an assumption which denies any sense of history of the development of the western liberal democracies themselves (Frischtak 1997, p.101).

Those wanting to use law and development to promote the new international economic agenda have argued that western style democratic institutions are essential for enabling development, because, the argument goes, western style democratic governments allow a free capitalist market to operate. The World Bank and IMF are quite open about pushing for western democracies as a condition for their loans, and strongly emphasise the need for a market economy to be a component of democracy (Arat 1991, pp.70, 73).⁴⁴

But the direct connection between a western style democracy and the requirements for development has never been established and cannot be assumed. In fact, adopting a democratic system of rule where it may conflict with the history, traditions, and culture of a society could be detrimental to development. Arat (1991) has argued that a market economy is not a pre-condition for a democracy to exist, or vice versa. India is cited as an example of how state ownership and control of some industrial sectors, and state intervention in favour of social reform and income redistribution, have strengthened democracy in India by increasing its social basis and political support (Arat 1991, p.35). Arat demonstrates that, although there is a positive correlation between economic development and democracy evident in his cross-sectional data, it is not confirmed by the longitudinal data, leading to the conclusion that increasing levels of economic development do not necessarily lead to higher levels of democracy. Correlation in this instance does not equate to causation (Arat 1991, pp.49, 53).⁴⁵

Furthermore, as discussed in Chapter One, the World Bank and IMF have been criticised for using state / market reforms to *undermine* democratic systems in developing countries.

⁴⁴ USAID have also promoted similar projects (DAC 1996, p.21).

⁴⁵ On this point see also Trebilcock (1997, pp.20-22).

As donors still anchor political conditionalities within the good-governance regime to orthodox economic conditionality and the fundamentals of 'market-friendly' development, client states are...restricted in how they wish to accomplish (or even define) development. Such an approach is hardly democratic in so far as it fails to respect 'peoples' rights to freely choose their own modes of development and to decide their own public policies (Schmitz, quoted in Fierlback 1997, p.33).

Arat (1991) extends this argument to the impact of the private sector on democratic institutions. Arat (1991, p.105) argues that free markets are powerful systems for producing goods and services for which there is an effective demand, but that the demand generated in such a system may not always be the most desirable means, from a social point of view, of ensuring an equitable allocation of resources across different sectors of the economy. Orford and Beard (1998) similarly argue that the lack of accountability in private sector (TNCs) undermines democratic processes. "In each case a democratic deficit has resulted from the pursuit of economic goals at the expense of accountability, participation and democracy" (Orford & Beard 1998, p.207). Huntington (cited in Arat 1991, p.35) argues that TNCs have actively contributed to the decline of democracies in developing countries. He argues that TNCs achieve this by shifting the interests of the native elite from an alignment with the welfare of the country, to an alignment with the welfare of the TNCs.

In comparison to the economic approach to democracy, scholars in India are attempting to grapple with the Indian concept of democracy, which is not a transplanted version of western democratic systems. One of the main differentiating characteristics of the Indian concept of democracy is that communal issues play a dominant role. Communal politics tend to be manifested through religious and linguistic political movements, and form the basis for most domestic conflict in India (Mallick 1998, p.27). Consequently, to ensure a stable democracy in India, there is a constant tension between the majority

rule and the protection of minority groups' interests.⁴⁶ Another differentiating character is the recent trend in Indian politics towards an unstable majority Government. As was evident in the 1998 elections in India, any party wishing to form Government is required to form a coalition with a range of other parties. This undermines the notion of an opposition party in parliament and it also means that no government has managed to govern for its full term due to the inevitable rifts within such wide ranging coalitions, which weakens any long term planning. These are characteristics which many western democracies are not required to address to the same extent.

The alternative models of democracy, as they relate to law and development, are much more cognisant of the issues of human rights than the western style democracy promoted under the economic approach. Arat (1991) for instance, in his exposition of an alternative model of democracy has identified some new measures of democracy. They include participation (the extent to which the popular consent is sought in selecting people for the decision making offices), inclusiveness (the extent to which people are excluded from voting on the basis of gender, race ethnicity etc), competitiveness (the extent to which the electorate is provided with choice) and civil liberties (the level to which governments recognise and respect civil liberties).⁴⁷

In the current atmosphere, where democracy is being promoted as an important component for development, it is important to recognise the links between supporting human rights and establishing effective democracies, and recognising that neither is expendable for the purposes of economic growth.

⁴⁶ This is not intended to imply that the tension between majority and minority interests does not occur in western democracies. In Australia for example, the minority interests of indigenous peoples are in constant tension with the majority's views. However, the nature of this tension takes on a different character in India because it is informed by religious and linguistic differences which can result in considerable civic unrest, as has been witnessed in Indian history in actions such as the partition in 1948.

⁴⁷ For another alternative approach to democracy, based around the issue of *freedom*, see Pandey 1993.

Civil Society and Good Governance

The concepts of civil society and good governance revolve around what Barrington Moore calls the three *social coordination* questions: how should resources be distributed? how should production be done? who shall make decisions and rule on these matters? (cited in Porter & Kilby 1996, p.79). This is the nexus at which we see the link between law, development, civil society and good governance. That is, these same questions are asked both in terms of development, and in terms of civil society and good governance. The law provides a regulating framework for answers to the questions for these inter-related fields. When talking about civil society and good governance it is critical to ask – ‘for whose benefit are good governance and civil society being developed?’ – rather than assuming that they are good for society. The question is a key one in deciding which aspects of civil society / good governance should be prioritised for development. The economic approach and the rights-based approach posit very different priorities in relation to civil society and good governance. I deal with civil society first.

Civil Society

The concept of civil society “arose from the emergence of a trans-national mercantile class that needed to break out of the regulatory boundaries of the State and whose interests diverged from those of traditional kinship and familial ties” (Porter & Kilby 1996, pp.83-84). Civil society used to be seen as “the handmaiden of the State, an essential aspect of the State’s domination of society” (Port & Kilby 1996, p.83). Today however, civil society is more commonly seen to denote the public space that lies between the State, individual citizens, and the market, a space where the individuals can develop autonomous, organised, and collective activities of the most varied nature.⁴⁸ It

⁴⁸ The DAC (1996, p.9) definition of civil society is similar but does not incorporate the market. Note that Gramsci’s views on civil society which have been quite influential, contain quite a different concept of civil society. Gramsci sees civil society as a part of the State, rather than as a separate entity. Gramsci makes a methodological distinction between the State and civil society where civil society is seen as part of the *private realm* (those social activities and institutions which are not directly part of the government, the judiciary or other repressive bodies ie police, armed forces). He sees civil society as having a dual role

is the arena of popular organisations, social movements, voluntary organisations, citizens associations and forms of public communication which, in large measure, are autonomous from the State (Porter & Kilby 1996, pp.83-84). Today rather than simply ruling citizens, governments are expected to respond to citizens' needs, which are often represented by civil society (Arat 1991, p.5). Civil society, as the basis of social pluralism, is also an essential component for the nurturing of democracy (Arat 1991, p.41). In this light it is becoming critical for women to become full participants in civil society to ensure that their needs are addressed. Furthermore, as the law is like the clotheshorse upon which many of the civil society pieces hang, women need to also engage with the law to be effective participants in civil society.⁴⁹

One of the key characteristics of civil society today relates to how the role of the State has changed in recent decades. As discussed in Chapter One, the trend has been to reduce the provider and regulatory role of the State, seeing it as an encumbrance and smotherer of private enterprise and economic growth and therefore too costly to support. Traditionally the voice of civil society has been a check on interfering, inefficient and incompetent states, in relation to both its economic and non-economic responsibilities. In response to the changing role of the State, the private market has flourished, forcing a new role onto civil society to represent those who do not benefit from the flourishing private sector. However, the relationship between civil society and the market is much

of providing a space in which the dominant social group organises consent and hegemony (as opposed to the ruling by coercion and direct domination of the *political realm*), but also as a space where the dominated social groups can organise their opposition and construct an alternative hegemony. That civil society is a part of the State is important for Gramsci because he argues that the free trade movement is based on a false organic distinction between political society and civil society. The distinction drawn by the free trade movement allows its proponents to assert that since economic activity belongs to civil society, the State must not intervene in it. But Gramsci argues that the State and civil society are in fact the same, to the extent that Gramsci saw civil society in the West as the core of society, of which the State was only the outer layer of defence. This perspective of civil society enables Gramsci to argue that capitalism is itself an intervention by the State, a deliberate state policy which changes the economic program of the State and the distribution of the national income (Forgacs 1988, pp. 210-11,420).

⁴⁹ For a discussion of the influences giving rise to the concept of civil society in development circles in the 1990s see Porter & Kilby (1996). They identify four main influences: (i) the experiences of structural adjustment lending, and in particular the use of loans moneys by heads of State for their personal purposes rather than for the nation; (ii) the resurgence of neo-liberalism in the West; (iii) the collapse of official communist regimes; and (iv) the rise of social movements and pro-democracy (capitalist) movements (Porter & Kilby 1996, p.81).

weaker than the relationship of civil society to the State, because the market has almost no formal accountability to the citizens, and therefore to civil society.

The economic approach has had to engage with civil society, but it has done so in a limited way. For example, the World Bank limits its concept of civil society to one of “reliance upon non-governmental and voluntary organisations to represent the interests of people and development of ‘social capital’ as measures to increase accountability through participation” (Orford & Beard 1998, p.211). The Bank is not interested in the development of civil society as a means of establishing secure and equitable development, but as a means for monitoring the States’ dispersal of public goods and services (Orford & Beard 1998, p.211), believing that this is all that is necessary for equitable development.

The rights-based approach to civil society has also been criticised. It is important to note these criticisms if we are to understand the influence of these debates on law and development today. Nancy Bermeo's arguments (1997, pp.77-89) reflect the views of other academics (Port & Kilby (1996), McAuslan (1997)) who have also criticised civil society for being seen as unquestioningly beneficial for development. Bermeo calls for a *de-romanticising* of civil society (1997, pp.77-89). Importantly she takes a similar line to Gramsci⁵⁰ and calls for the polarity between the State and civil society to be debunked so that we are able to analyse the complexities, in terms of the multiplicity and in terms of the disadvantages of the density of civil society.⁵¹ Bermeo calls for this for the very important reason of highlighting the capacity of civil society to destabilise the State and the nation. This aspect of civil society is resonant in Arat's (1991, p.129) argument that civil society is limited to tolerating only minimal levels of activity and interest to ensure the smooth working of the political system. But as Arat also points out “citizens in

⁵⁰ See footnote 48.

⁵¹ The DAC has also commented on the interdependent relationship between civil society and the State: “The State has a critical role with respect to civil society in providing a functioning and accessible legal system and in ensuring the existence of a legally protected ‘public sphere’ where social society can develop with no undue interference. Without a vigorous civil society, the State is narrowly based and susceptible to capture by political and economic opportunists” (DAC 1996, p.10).

developing countries, experiencing wider economic and social discrepancies ... are more politicized and less willing to confine their activities to those 'well-defined' roles" (Arat 1991, p.129).

Whether civil society can have a role in destabilising States is an important issue in light of the impacts of economic globalisation on local populations in developing countries. Economic liberalisation produces inequality to varying degrees, at least in the short term, if not longer term. These inequalities are challenged by civil society. Sometimes the challenge is against the State, sometimes it is against the market, and sometimes it is between different sectors of civil society itself. An example of the latter scenario are the riots that followed Andres Perez's attempt at structural adjustment in Venezuela which began as a conflict between students and bus drivers (Bermeo 1997, p.84). Either way, these examples illustrate that civil society has the ability to destabilise the State, and with it the economic liberalisation process. Bermeo (1997, pp.84-86) argues that only by recognising civil society's plural and highly conflictual nature, can appropriate political arenas be developed whereby competing interests can interact and formulate mutually acceptable responses to the problems of scarcity that liberalization will inevitably create.

The reaction of the State to the potentially destabilising elements of civil society, in India at least, has been potentially very repressive. Activist voluntary organisations within civil society which advocate for people's rights are often seen as a threat by the State because the State perceives them to be trying to undermine the State's position of governance. "The reaction of the Government ... has been repression against those who have been threatening their domination" (Fernandes 1986, p.5). Some of the methods employed by the State in India include: publicly undermining groups' credibility by calling them extremists; controlling the flow of funds; denying legal entitlements (eg tax free donations); and by placing burdensome administrative and accountability requirements (Fernandes 1986, p.5).

Fernandes (1986, p.4) makes the point that the State is more willing to work with the *service providers* (voluntary organisations which deliver services to citizens that were previously provided by the State) than with the *activist groups* (voluntary organisations which focus on lobbying and advocacy). This growth in service providers has resulted from the push by institutions such as the World Bank and IMF for the State to play a smaller role in service provision and for the services to be provided by the market instead, whereupon civil society has been co-opted into becoming a competitor in the market.

.... both transactional capitalism and its key global agencies consisting of various UN bodies and foreign aid and credit organisations – the World Bank, IMF, UNDP etc – have discovered in the NGO sector a most effective instrument of promoting ... the new global thrust of liberalisation and privatisation and integration of the Third World into a homogenous world economy... (Kothari 1986, p.14).

It is essential that civil society is not co-opted by the State in this manner. Just as Gandhi's actions of "internal disturbance" created a space for liberation, so activism's underlying impulse is to renovate both the civil society and the State (Baxi 1986, p.40). "Social movement and grass roots action are the source of accountability of the State to civil society" (Baxi 1986, p.33). Reducing the role of civil society to service provision, would have the impact of removing the role of civil society as a voice that checks the actions of the State and provides a voice for those disadvantaged groups whose needs are not met by the State or the market.⁵² For these reasons it is essential that civil society be maintained as an active and relevant component of law and development.

Good Governance

Under the economic approach, the World Bank focuses on the economic aspects of good governance. For instance, the Bank's definition of good governance is "the manner in

⁵² Otto (1997) also mentions the danger NGOs face in terms of "their local accountabilities and ethical principles compromised by the financial and discursive capacity of states to shape their agendas" (1997, p.42) and the extent to which compromised NGOs will enable States to determine their definitions of rights and violations without check.

which power is exercised in the management of country's economic and social resources" (DFAT 1993, p.92). The Bank's idea of governance focuses on the administrative and managerial aspects of governance (Leftwich 1994, p.365). Comparatively, NGOs and academics that adopt a more rights-based approach, choose to see governance in terms of the interaction of civil society with the structures and practices of government (Porter & Kilby 1996, p.80).⁵³

The World Bank is a useful example for exploring the economic approach to good governance. The World Bank's focus on issues of good governance emerged in the 1980s out of the *crisis of governance* identified by the Bank as the underlying problem of Africa's underdevelopment. Research such as that done by Reynolds, who surveyed more than 100 years of comparative development experience in forty less developed countries, showed that the variable most important in explaining the lack of economic development was political organisation and the administrative competence of government (cited in Trebilcock 1997, p.19). The Bank's focus on good governance emerged out of the shift the Bank made to relying on the private sector as drivers of economic development, rather than States / Governments. So the Bank's promotion of good governance has been closely linked with its promotion of the reduced role of the State, and the promotion of the private sector, for the purposes of greater economic benefit.

⁵³ The DAC definition of good governance is "the use of political authority and exercise of control in a society in relation to the management of its resources for social and economic development" (AIDAB 1995, p.2). The principles I intend to refer to in using the term *good governance* in this thesis are not limited to notions of efficiency and accountability, but extend beyond the DAC and World Bank definitions to include: respect for human rights and the rule-of-law; guarantee of individual and group rights and security; viable framework for economic and social activity; allow and encourage individuals to participate; equity; and sustainability. Thus the term good governance is intended to focus on political and humanitarian concerns as well as economic concerns of governance. Also, in the debate on good governance the World Bank especially, has commonly used the term *good government* rather than good governance. The distinction between government and governance is that the government refers to the formal structure of the government, whereas the government's ability and manner in managing a society's resources, exercise of control, and discipline over its own power and policy instruments, is the government's ability to govern. Governance is the qualitative dimension of governments (Frischtak 1997, p. 105).

In contrast, the rights-based approach enables the State to include non-economic factors in its decisions on governance. The rights-based approach places a heavy reliance on the human rights discourse being a part of governance. The international human rights regime, to which India and many donors are party to, places an important obligation on the Indian State and donors to ensure that decisions of governance are not made in a vacuum. For instance, where a hydro-electric dam is identified as a development priority, the project must ensure that international human rights obligations are not abused in the process. An active and effective civil society has recourse to the international level on the basis of international human rights, to ensure that people's rights are not abused by the State.

By including the issue of human rights in governance, there is an increased focus on the question of *who are the beneficiaries?* This perspective has an important gender significance because, as argued in Chapter One, gender issues are not always sufficiently addressed under the economic approach. However, a rights-based approach, by focusing the debate on people's rights, directs law and development to consider good governance in a way that ensures women's needs and issues are incorporated.

2.2 A Feminist Analysis of the Rights-Based Approach

In seeking to transform global policies in areas like development and human rights so that they better incorporate and respond to women's lives, we are also demonstrating that women's issues are not separate but are neglected aspects of these global agendas. Indeed, ignoring women's experiences and views has kept society further away from the common solutions so badly needed in many of these areas (Bunch 1995, p.11).

Examining the links between women, law, and development, has led us down the path to question how the field of law and development can relate to women. The focus in this section is on how effectively the rights-based approach can incorporate women's issues in the field.⁵⁴ The conclusion drawn is that despite the criticisms of a rights-based

⁵⁴ Feminist criticisms of the economic approach were outlined in Chapter One.

approach from a feminist perspective, this approach still provides the greatest scope in law and development for incorporating the needs and issues of disadvantaged women in developing countries.

Women's Rights are Human Rights

To begin with it is necessary to examine women's human rights because how women are incorporated into the human rights discourse is key to how women are incorporated into the rights-based approach. There has been extensive criticism of the human rights discourse from a feminist perspective, but this analysis is limited to drawing on those aspects which are relevant to the rights-based approach.

"Of all the violations of human rights, the most systematic, widespread and entrenched is the denial of equality to women" (*Many Voices, One World*, UNESCO, Paris, 1980, pp. 189 quoted in Tomasevski 1989, pp. 185). The human rights discourse has been strongly criticised from a feminist perspective for adopting a universal approach, that is based on equating *white, middle class, heterosexual, able-bodied male* with what is meant by *human* in human rights (Bunch (1995), Friedman (1995), Charlesworth (1995, 1998(a) and (b)), Otto (1998), Eisler (1987), Engle (1992)). The human rights discourse has tended to follow a generic rather than gender specific approach that focuses on securing equal rights for all human beings, rather than allowing for gender specific rights.⁵⁵

Stemming from this underlying problem with human rights discourse possessing a *non-inclusive universality* (Otto 1998, public address), other related criticisms that feminists have raised range from arguing that women's human rights are treated as second class rights, to criticising the low numbers of women employed in the human rights industry.

⁵⁵ In response to this underlying problem, some feminists have argued that women's rights should be a separate category of rights. For example, the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) have constructed an alternative *Universal Declaration of Human Rights*

The discourse has also been criticised for not addressing the power relations within which women are required to operate. Similarly, human rights monitoring systems have been criticised for not focusing enough on abuses of women's rights. It has also been argued that the language and meaning of rights within the human rights discourse has to be constantly negotiated to ensure that women's rights are not abused (Bunch (1995), Charlesworth 1998(a)).

Key to the non-inclusiveness of human rights has been the split between the private and public sphere. Eisler traces the root of this split back to the writings of Locke and Rousseau in the seventeenth and eighteenth century who defined women as members of men's households, and so were confined to the private sphere, which was under man's control, rather than the State's (Eisler 1987, p.289). Feminists have criticised the human rights discourse for its focus on the public sphere, at the cost of human rights abuses against women in the private sphere being ignored (Rao 1996, p.102). An often cited example of this is domestic violence which has not been included within the definition of torture because it does not involve an act committed by a public official, and therefore does not take place in the public sphere.⁵⁶

Another criticism of human rights has been the issue of *trade-off* between rights. This has been a significant criticism of the rights movement by women in India in relation to the struggle between religious rights and women's rights. The women's movement in India has been engaged in a campaign for a secular uniform civil code which has been impeded by the Muslim community who has been arguing that a uniform civil code would deny them their right to practice their religion. This issue was strongly debated during the *Shah Bano* Case (Kumar 1997, pp.160-168), and those debates continue today.⁵⁷

from a Gender Perspective which covers issues such as violence against women and the trafficking of women and girls (as posted on the email list: ausfem-polnet@postoffice.utas.edu.au, 1998).

⁵⁶ See Eisler (1987) for a discussion of the issues on the public / private split in the human rights discourse.

⁵⁷ See Parashar (1992), Rahman (1990), Kumar (1997), Agnihotri & Mazumdar (1995), Kapur & Cossman (1996), Hasan (1994), Cossman & Kapur (1997).

To ensure that the universal application of human rights is more inclusive feminists have been actively promoting the theme of *women's rights are human rights*. Gaining recognition of women's rights as human rights is critical to ensuring that the rights-based approach to law and development is able to address women's issues. Women's rights as human rights has evolved as a theme among feminist analyses of international human rights, and women's movements generally, as was evident at the UN Fourth World Conference for Women in Beijing (1995). But in this instance I focus on the emergence of this concept within the development context to further illustrate some of the complexities of the connection between human rights and law and development.

The shift in development thinking from meeting basic needs to asserting women's rights as human rights has been a long process. The process began by linking women's needs to development, then linking women's needs to women's human rights. Basic needs were traditionally identified in development, and particularly under the Women in Development (WID) discourse, as practical requirements such as food, clothing, housing and water. The term basic needs did not extend to include women's *strategic needs*, such as freedom from gender violence, physical integrity, sexual and reproductive freedom (Facio 1995, p.17).⁵⁸ Identifying women's strategic needs became the basis for the recognition of women's rights in development, which have ultimately been linked to human rights. In terms of the transition from basic needs to human rights Facio (1995) makes the valid point that there needs to be a good understanding of women's basic needs and strategic needs before they can be translated into enforceable rights.

Since the World Conference for Women in Mexico in 1975, there has been a growth in the recognition of women's rights in development. In 1991 Roxana Carrillo, in her

⁵⁸ Facio (1995, p.17) argues that the ultimate *need* of women goes beyond the need to be protected, the need for child care benefits or the need for alimony, to the need for freedom from subordination of men. Although, the need for freedom from discrimination is a fundamental need of women which must be addressed in development, I would hesitate to place it as the ultimate need as Facio does because of the narrow limitations this places on recognising the needs of women. Women in India for instance often have to deal with a wider context of discrimination than just gender discrimination. Dimensions such as caste and class discrimination also shape their context.

groundbreaking paper “Violence Against Women: An Obstacle to Development” drew the direct connection between women’s strategic needs, human rights and development, by showing the impact of gender violence in terms of the economic and social costs to society.⁵⁹ The arrival of the theme, *women’s rights as human rights*, was confirmed by the adoption of it at the Vienna Declaration of the UN World Conference on Human Rights (1993) and the UN Fourth World Conference for Women in Beijing (1995).

With the transition from WID to a Gender and Development (GAD) discourse in development, the issue of women’s rights was retained but raised within a gendered approach rather than a women-identified approach. For example, Maxine Molyneux defines women’s gender interests as arising from “their lived realities as socially gendered individuals, and their strategic gender interests, which are deduced from an analysis of women’s subordination and are oriented to [the] transformation of relations between the sexes” (Goetz 1997, p.23). The GAD approach has been able to take advantage of the generic approach of human rights discourse by discussing women’s human rights in the generic sense (in contrast to the WID approach which was more focused on women specific projects).

The crucial difference that engaging with human rights brings to development is that women are no longer seen as beneficiaries of development policies. Rather, they become persons *entitled* to participate in and partake of the benefits of development (Facio 1995, p.17). Thus the elimination of discrimination against women is a fundamental tenet of development. Many third world feminists, while recognising the value of using human rights discourse to assert their claims, have continued to advocate the importance of situating any discussion of women’s human rights within the realities of development issues.

⁵⁹ Connecting women’s needs with human rights has meant that the division between civil and political rights and economic, social and cultural rights, has been transcended in conventions such as CEDAW. Thus the women’s rights as human rights approach has also contributed to strengthening the interconnectedness between civil and political and economic, social and cultural rights.

The rights discourse does open up new dimensions of analysis and investigations. Social movements, which aim at fighting exploitative practices, may utilise the moral strength of individual dignity to strategize the fight for justice. However, in order to invest such strategization with some substantive content, it has to be properly contextualized. For instance the whole issue of reproductive health rights for women in India needs to be seen in the perspective of the dismal status of primary health care in the country, as also the rampant poverty of the masses that negates access to basic needs irrespective of gender (Mukhopadhyay 1998, p.13).

As the human rights regime becomes more closely integrated with development issues, it is important that gender biased assumptions underlying the human rights regime be challenged, rather than duplicated within the law and development field.⁶⁰

Feminist Views of Democracy, Civil society and Good Governance

The concepts of democracy, civil society and good governance, which I argue can be more effectively incorporated into law and development under a rights-based approach, have also been criticised from a feminist perspective. In terms of democracy for instance, once it is understood that “feminist analysis begins with the recognition that each of us views societal concepts and institutions from a different lens, depending on our consciousness and our place in society ... certain questions become important, such as: who has been excluded from exercising the rights of citizenship?” (Bunch 1995, pp.11).⁶¹

In this section I demonstrate some of the thinking around the question of exclusion of women from these institutions, by focusing on a discussion by Pateman (1991) of the relationship between civil society and women.

⁶⁰ Kapur and Cossman (1996, p.288) similarly conclude that the “question has become less one of which ‘side’ of the debate is right, and more one of applying the insights of the debate to particular strategies and campaigns in which social movements have deployed rights discourse”.

⁶¹ For a useful discussion of feminist theorisations of *Democracy* see Alexander and Talpade (1997, pp. xiii-xlii).

Civil Society and Women

Pateman (1991), criticising the concept of the original civil society from a feminist perspective, argues that “civil society is based on the contract which is entered into by men, but ... women are not considered free and equal individuals who are allowed to enter into such a contract” (Pateman 1991, p.66). Pateman argues that this original contract is not only a *social* contract which constitutes the civil law and political right in the sense of (State) government; it is also a *sexual* contract that institutes a political right in the form of patriarchal – masculine – power, or government by men, a power exercised in large part as a conjugal right (Pateman 1991, pp.66-67).

What is important in this analysis is that in the original contract and the associated civil society, *woman* has been absented by incorporating her into *nature* or into the *family*. Civil society is not an uncoerced space of free associations for women and other marginalised groups. Rather it is a space which can mobilise but also constrain the construction and organisation of interests that challenge dominant discourses of gendered power.

In the light of Pateman’s criticisms of civil society, one can ask the question, what opportunity is there for women in playing a role in civil society? As already outlined in this chapter, civil society plays an important role in limiting the powers of the State, and as such the relationship between State and civil society is a critical arena for the negotiation and struggle for women’s interests. The democratic tradition in India means that the State is not entirely neglectful of issues arising from women’s struggles.⁶² The resulting formal and informal networks of power can be negotiated by women’s groups to best serve women’s interests. The National Commission for Women is one organisation that is linking women’s groups with the State in an attempt to negotiate this space (Rai 1997, pp.271-272). As Guest argues, “civil society can be a site where ...

⁶² The historical overview of the Indian women’s movement in Chapter Three highlights some of the features of women’s involvement in this democratic tradition.

feminist engagement ... must persistently undo the text of exploitation” (Guest 1997, p.93).

In spite of the feminist criticisms of the rights-based approach, this approach can still provide an invaluable contribution to the field of law and development by creating a space within which women’s needs and issues can be raised in the field.

2.4 The Economic Approach vs The Rights-Based Approach

In this chapter some stark distinctions have been drawn between the economic approach and the rights-based approach. This method of categorisation has been adopted for the sake of clarity and conceptual neatness, hopefully without simplifying the complexities too much. There is however considerable overlap between the two approaches, especially in the areas of democracy, civil society and good governance. For example, arguably, the premise for legal projects under both approaches is that a predictable legal environment, democracy, civil society and good governance are essential factors for sustainable development. Where possible, the areas of overlap have been identified.

Having said that, in this thesis the focus has been mainly on the differences between the two approaches, to the extent that they may seem incompatible. What is the relationship then between the economic approach and the rights-based approach? It would be tempting, but unrealistic, to argue for the position that the rights-based approach should replace the economic approach. Economic globalisation is a fact of the world today, and it is a fact that is driving the economic approach to law and development. As the field of law and development continues to mature, we see the advantages of the two approaches becoming more closely interconnected. I contend that, where possible, the rights-based approach can be used to influence the economic approach to ensure a broader perspective of law and development.

3. WOMEN AND LAW IN INDIA

Women occupy a defined and structured space in India's legal framework. At the international level, the Government of India ratified the *Convention on the Elimination of all Forms of Discrimination Against Women* on 9 July 1993, thereby placing a legal obligation on the State of India to recognise and uphold particular rights of women. At the national level, women's equality is recognised in the Indian Constitution.⁶³ At the local and state level, women's participation in the Panchayat system has been made mandatory. This negotiated space for women is the result of a strong and vibrant history of women's activism in India.⁶⁴ The use of law reform to achieve social change has been a key mechanism of the Indian women's movement.

However, alongside this progress many Indian women activists have also experienced feelings of frustration. To explore some of the reasons for this frustration the historical reviews in the first section of this chapter draw on some of the key developments in the Indian women's movement which focused on legal strategies.⁶⁵ This is followed by an examination of contemporary feminist legal theory from India, which has identified alternative theoretical avenues that reposition women's approach to the use of law, thereby addressing some of the frustrations. One of the theories analysed, which constructs the law as a *subversive site*, provides a means of viewing the law that is consistent with the rights-based approach to law and development. In light of the increasing use of legal systems for development at the global level, as discussed in Chapter One, it is essential for women to be identifying new methodologies such as these for engaging with the law.

⁶³ See Appendix 3 for the text of Articles 14, 15 and 16, Part III, Fundamental Rights, Constitution of India.

⁶⁴ See Kumar (1996), Matson Everett (1981), and Kishwar & Vanita (1996).

⁶⁵ See Kapur & Cossman (1996, pp.43-68), Kumar (1981), Sargari & Vaid (1990), Gandhi & Shah (1991), and Nair (1996).

3.1 A Brief History of Legal Strategies in the Indian Women's Movement

The history of women's activism in India is commonly categorised into three waves: (i) the social reformers of the nineteenth century; (ii) women's involvement in the independence movement; and (iii) the contemporary women's movement. The demand for legal rights has been a cornerstone of each period of the women's movement in India. Kapur and Cossman (1996, pp.19-20) go so far as to say that the demands for equal rights for women have given India's women's movement its political character. This section examines the legal strategies which have been used in each of the periods, focusing on the reasons for the successes and the frustrations, and on why law reform became the dominant means of mapping out the terrain of women's rights.

Social Reformers of the Nineteenth Century

The Indian social reform movement developed out of the encounter with British rule, where what began as a trading relationship expanded into economic and political domination and rule (Kumar 1993, p.7). Under British rule many of the existing dominant groups in India (ie the gentry, traders, scribes etc) formed a new bourgeois society. This new bourgeois class sought to reform itself and Indian society in response to colonial criticisms of India being a barbaric society.

Women's rights were a central focus of this reform process. Women's rights came to play such a central role in the debate because the British rulers used the position of women in India as evidence of Indian society being an uncivilised society.⁶⁶

Within the British frame of reference, the position of women in Indian society was unsatisfactory. Charles Heimsath points out that the English education acquired by [India's] elite taught that social practices should be based on reason not tradition ... [This] suggests why some members of the educated elite in India developed a reformist ... consciousness on the

⁶⁶ Not all social reform during this period occurred solely because of the British encounter, but the British influence did restructure most areas of social reform (Kumar 1993, pp.7-8).

subject of women and acted to improve women's status (Matson Everett 1981, pp.49-50).

Therefore central reform figures, such as Rammohun Roy and Behram Malabari, advocated for the change of social practices which related directly to the treatment of Indian women, including sati and child marriage (Kapur & Cossman 1996, pp.45, 47). Law reform was a key strategy of these campaigns and legislation, against both sati and child marriage, was successfully passed.⁶⁷

It is important to note that because the issue of women's rights was raised within the context of the colonial power delegitimising traditional Hindu religious and social norms, many other Indians (*revivalists*) reacted against the colonialist agenda and fought against the reforms, in an effort to preserve Hindu culture. The campaigns on sati and child marriage illustrate that women's rights were used by the British, the reformers, and the revivalists, to work out their competing visions of Hindu tradition and custom. Women's rights thus became the site for contestation between colonial rule and the preservation of Hindu culture. It is also important that the contestation of these issues took place primarily in the legal system – a system which was established and used by the colonial power to retain rule over the nation.⁶⁸

Social reformers sought to reform [Hindu] tradition and custom while simultaneously seeking support for this reform in Hindu scriptures. The conservative and orthodox forces that opposed reform similarly sought to legitimate the authority of their very different vision of Hindu tradition and custom in Hindu scriptures. The contest was over who had the authority to define tradition and custom, a contest which was fought out on the terrain of law (Kapur & Cossman 1996, p.51).

Thus the real battle in the courts was not necessarily about women's rights, but about resisting colonial intervention. Most of the reformers, the revivalists, and the

⁶⁷ In December 1829, the British administration brought in the regulation prohibiting sati. In 1860, section 375 of the *Penal Code*, was amended to raise the age of consent to ten years (Kapur & Cossman 1986, pp.46,48).

⁶⁸ B. G. Tilak, another reformer of the times, in fact refused to work with colonial legal instruments for the purposes of social change because of the perceived illegitimacy of the colonial hegemony in all its ramifications (Mukhopadhyay 1998, p.11).

colonial administrators were men and so primarily men fought out the contest over women's bodies, roles and rights. The impact of the legislation for women was arguably almost a secondary issue (Mani 1990, p.90). So, although the social reformers were successful in having reform legislation passed the implementation of such legislation was virtually absent.

This gap between legislation and implementation demonstrated the difference between the public and private domain in nineteenth century India. The public domain, in which the legal system was placed, was dominated by the British colonial power. Hindu tradition, and the defence of it, was relegated to the private domain, a space successfully defined by the revivalists as beyond the reach of colonial intervention.⁶⁹

Women and the Independence Movement

During the independence movement, the *western and alien* ideas of the social reformers came into disrepute as intellectual and spiritual leaders – Vivekananda, Sri Aurobindo, Annie Besant, and Sister Nivedita – sought to resurrect the ideals of the Hindu past. The glorification of women's roles as wives and mothers, uncontaminated by Western colonialism, came to infuse the very discourse of nationalism. *Indian womanhood* became the very embodiment of nationalism, as the nation came to be constructed as the divine mother, as Mother India.⁷⁰

One of the major differences between the independence movement and the reform movement was that by the beginning of the twentieth century, women themselves more commonly became public figures in the debates on women's rights. The Women's Indian Association was established in 1917, the National Council of

⁶⁹ For a discussion of how the public / private dichotomy was effected by the colonial encounter, see Sangari & Vaid (1990, pp.10-17).

⁷⁰ The image of Mother India was to continue into the post-independence era, as represented in the movie *Mother India*, where the struggles of a post-independence India were personified in the struggle of a woman trying to preserve her family against pestilence, plague, drought, and death which were impacting on India at the time.

Women in 1925 and the All-India Women's Conference in 1927 (Kapur & Cossman 1996, p.52). The central issues which the women's movement focused on were political representation and constitutional equality.

Activists such as Besant and Sorojini Naidu used the nationalistic embodiment of Indian womanhood in their campaigns. They promoted the concept of *women's uplift*, which valued women's distinctive contribution to development and on that basis argued for the reform of social practices so that women could play a more constructive role in society (Matson Everett 1981, p.83). So rather than using women to promote national reform, as happened during the reform era, in the independence movement, nationalism was used to promote women (Matson Everett 1981, pp.86-88).

India's greatness will not return until Indian womanhood obtains a larger, freer, fuller life, for largely in the hands of Indian women must be the redemption of India (quote from Annie Besant in G A Natesan (ed.), *Speeches and Writings of Annie Besant*, Madras, 1921 referred to in Matson Everett 1981, p. 88).

The focus on the legal framework in the women's movement during this period occurred largely because the establishment of an independent India was strongly linked with the formation of a new Constitution, which was to be the blue print for the new India. The creation of a new constitution stimulated discussion on many economic, political, and social issues, including those affecting women – all framed by the law and the language of rights. This approach was heavily reliant on liberal theories, including a liberal feminist perspective, which focused on individual rights and equality.

Women activists in the 1920s and 1930s replaced the call for women's uplift with the call for equal rights which could more appropriately be incorporated into the constitution (Matson Everett 1981, p.82). This approach was successful in that Articles 15 and 16 of the Constitution prohibited discrimination on the grounds of

sex, allowed for special provisions to be made for women and children, and guaranteed equality of employment for women.⁷¹

Although the women's movement met with some success, the language of rights it relied on also restricted the scope for achieving change, by limiting the focus to the Constitution. That is, this approach was successful in establishing formal equality for women in India in the public domain and in establishing representational space for women in politics. However, little progress was achieved in altering women's social and economic status in the domestic sphere where traditional Hindu perspectives of the role of women prevailed.

Contemporary Women's Movement

Three decades after Independence, and after three decades of planned development, the picture of women's position that emerged was startling in its grimness...Women's position was worsening in practically every sphere, with the exception of some gains in education and employment for middle-class women. Women were found in the least paid jobs, working long hours, and bearing full responsibility for the home by fetching fuel and water, by doing work in family production units, without being paid for the labour, by bringing up children, and caring (for) the sick and the aged. There was growing violence against women – rape, wife battering, family violence, dowry deaths, and prostitution. This was the stark reality for millions of women (*Towards Equality Report*, quoted in, John 1996, p.126).

The *Towards Equality Report* by the Committee on the Status of Women in 1975,⁷² in many ways marked the advent of the contemporary women's movement in India. The Report drew attention to the devaluation of women in the areas of health, employment and political participation, and pointed to the existence of gender bias in different cultural institutions such as marriage and the family (Chowdhary 1994, p.179). This Report's findings and recommendations provided the backdrop for the Indian women's contemporary movement.

⁷¹ See Appendix 3 for the full text of Articles 15 and 16.

⁷² The full title of the Report is *Towards Equality: Report of the Committee on the Status of Women in India* (Ministry of Education and Social Welfare, New Delhi, 1975).

From the late 1970s to the 1990s the women's movement has campaigned for a number of legal reforms including the introduction of a Uniform Civil Code, the reforming of rape laws, the strengthening of existing legislation prohibiting sati, the prohibition of sex determination testing, and amendments to sexual assault laws. There was a distinct shift in focus from the Constitution to legal campaigns.

In addition activists increasingly focused on non-legislative campaigns. These included literacy programs in the anti-arrack campaign in Andhra Pradesh (Agnihotri & Mazumdar 1995), public demonstrations, strikes, and rallies in the anti-price rise campaign (Kumar 1993, p.103), guerrilla warfare training in the landless labourers' campaign (Kumar 1993, p.100), public apologies and shaming techniques in the domestic violence campaign (Kumar 1993, p.101), the Chipko environmental movement (Kumar 1993), unionisation, the creation of theatre groups, awareness raising campaigns, production of literature, slum-improvement, health improvement campaigns, and income generation schemes among others (Kumar 1993, p.148).⁷³

Another notable characteristic of the contemporary women's movement in India, has been the extensive influence of middle class Indian women, who have largely been the central protagonists during this period and have dominated the leadership of the women's movement (Gandhi & Shah 1991, p.22). The middle class families of India played a large role in the creation of the independent Indian State and so have almost felt a sense of ownership over the Indian State (Ram, private conversation, 1998).⁷⁴ In addition to which, middle class women tend to be literate, educated, and familiar with the State and its apparatus, and therefore have greater access to the law. So an important impact of middle class women playing such a central role in the Indian

⁷³ See also Gandhi and Shah (1991, pp.19-23).

⁷⁴ John (1996, p.125) also discusses the situation of the pre-independence generation of politically active middle-class women who had placed their hopes for equality on an egalitarian free India, only to find in the 1970s that there was a complete absence of women's perspective in the overall development process, and among the planners and policy makers. Mohanty (1991(b), p.20) queries the "nature of the collusion of colonialist and nationalist discourses in constructions of middle-class womanhood" in her discussion of the complex relationship between middle-class Indian women and the independence / nationalist movement.

women's movement, has been that they more readily engaged with the State and its apparatus (ie the legal system) in their efforts to achieve social change.

However, law reform has not been sufficient to achieve real change in many women's lives. In 1993, 71 per cent of Indian women were illiterate; the majority of Indian women owned little or no property; and economically, socially and politically women were the lowest strata of society (Gopal 1993, p.64).

Despite the proliferation of laws intended to guarantee women's rights, many of these laws are inaccessible to the vast majority of Indian women. An enormous gap exists between formal equality rights and the substantive inequality that continues to characterize women's lives. Women lack access to effective enforcement mechanisms. Women may not be aware of their legal rights; they may face too many social pressures within their families and communities to make a claim for their rights; and they may lack economic, geographic, and even political access to the legal system (Cossman & Kapur 1993, p. 289).

Consequently there has been a growing sense of frustration among women activists advocating for law reform. Flavia Agnes (1998) who has worked for many years to combat domestic violence in India poses the question whether law reform can achieve substantial change. Agnes cites weak legislation where the "functioning is totally contradictory to the spirit of enactment" (1998, p.81),⁷⁵ higher punishment levels leading to fewer convictions, and evasion by the State on basic issues such as economic rights, as some of the problems which lead her to describe law reform as "at best ... an eyewash" (1998, p.83). Seema Sakhare, in light of her work with rape victims in India also responds negatively to such a question:

In spite of my hard work for the last seven years trying to get justice through the courts, I have not had great success. The factors which have contributed to this are the defective procedure for collection of information and investigation by police, the casual approach of the

⁷⁵ This point has also been made in relation to the rape law amendments passed in 1983. Kumar (1993, p.135) argues that the Amendment which was finally enacted was a truncated version of the initial Bill, which left out many recommendations made by the Law Commission and women's groups. Gopal (1993, p.69) has argued that the resulting legislation can often be termed in language that reinforces patriarchal structures, or applies a gender blind norm that undermines any substantive equality for women.

doctors, and regrettably the corruption in the judiciary as well as the general lack of legal literacy (Sakhare 1994, p.66).⁷⁶

A similar questioning of legal strategies was taken up in response to the events that followed the Mathura case where a young woman was raped by police in Bhagpat, Haryana. The activism on this issue was successful in the sense that legislation was passed addressing the issue of police rape. Yet in the aftermath, there was a growing feeling in the women's movement that "there was no connection at all between the enactment of new laws and their implementation" (Kumar 1993, p.143).

This sense of frustration with law reform appears to stem from Indian women activists' expectations of the law as an *independent variable* for social change. My impression is that in relation to law reform, many women activists have perceived the law as an absolute mechanism, which can instigate social change simply by enacting legislation. Chowdhary (1994, p.182) for instance argues that a common view found in the Indian women's movement is that disadvantage in India is caused by a skewed distribution of benefits and privileges, which is preventable through legislative and administrative action. The *Towards Equality Report* also saw legislation as capable of acting "directly as a norm setter, or indirectly, providing institutions which accelerate special change by making it more acceptable" (quoted in Mukhopadhyay 1998, p.9).

However, the case studies examined in Chapter Four demonstrate that it may be more effective to view the law as a factor in inducing social, political and economic change, but not necessarily as the sole means of change – that is, to see the law as a *dependent variable* for social change.

⁷⁶ Ironically, for many Indian women, the lack of enforceability of laws may sometimes be to their advantage. For example, under the new TRIPS agreements, American companies have taken out patents on the neem plant, a plant which has been traditionally used on a daily basis by Indians for medicinal purposes for thousands of years. Were a village woman to continue to use the neem plant, under the TRIPS agreement she would be required to pay a price to the patenting company, a cost she may not be able to afford. But unless India's legal enforcement mechanisms are improved, it is a cost she will probably not pay.

...law cannot be seen as an entirely independent variable. Law plays a modest, though important, reinforcing role in the process of social change...while overstating the importance of law leads to absurd practical results and academic scorn, students of law can still contribute to the understanding of social change provided they remain sensitive to the inherent limits of their field (Mehren & Sawers 1992, p.67).

The *Towards Equality Report* and other reports such as the *National Perspective Plan*, have recognised the limitations of a legal framework in achieving social change, recognising it to be a component of a larger strategy which must include actions by other agencies and sectors of society.⁷⁷ Similarly Parashar argues that “instead of dismissing law reform as a means of achieving equality for women, it is more productive to realise the limitations of law and have appropriate expectations that law reform by itself will be insufficient to change society and end women’s oppression” (Parashar 1992, p.30). The recognition of the limitations of law reform is significant in that it marks the shift from seeing law as an independent variable to seeing it as a dependent variable.

In the context of a growing field of law and development, which focuses on economic growth to the detriment of women’s needs, it is essential that women in India explore new local theories and practices which address existing frustrations with the law. Having examined the historical context for women using legal strategies in India, in this next section I examine contemporary feminist legal theory, developed in India that can provide a theoretical framework which enables women to engage with the law more effectively.

3.2 Contemporary Indian Feminist Legal Theory

The contradictory results of legal strategies discussed in the previous section have created an ambivalence in the Indian women’s movement towards engaging with the

⁷⁷ For example, once the provision for reserving positions for women in Panchayats was introduced into the Constitution in 1992, voluntary organisations had to take on the real work of training and educating the women who were to take up the positions (Gathia, personal interview, 1997). Without the training the chances for any improvement in women’s participation in governance were limited.

law. This ambivalence is supported by traditional feminist theories, from both inside and outside of India, which view the law as a patriarchal system that is unable to deliver gender justice. Kapur and Cossman's theory of law, as outlined in *Subversive Sites: Feminist Engagements With Law in India* (1996), throws a challenge to this ambivalence. On the basis that "relinquishing the terrain of law would be to surrender a powerful site in discursive struggles" (Kapur & Cossman, 1996, p.285) Kapur and Cossman develop an alternative theoretical approach to the law which views the law as a *subversive site*. In this section the tenets of this theory, and the possibilities it creates for women to use the law in more effective ways, are explored.

The central thesis of Kapur and Cossman's theory is that the law needs to be recognised and approached as "a site for a broader discursive struggle over the identity and status of women" (1996, p.60) through which the Indian women's movement can endeavour to challenge and change the subordinate position of women.

[Law is] a terrain on which competing visions of the world are fought out; on which contesting normative visions struggle for the power to define legal and political concepts that give meaning to our world (Kapur & Cossman 1996, p.41).⁷⁸

Kapur and Cossman examine a range of feminist legal theories and practices in order to develop their idea of law as a *subversive site*. Of the feminist theories stemming from outside of India, Kapur and Cossman draw most on post-structuralist feminism because it enables them to examine the law as a *discourse* (Kapur & Cossman 1996, p.37).⁷⁹ That is, it enables an examination of the law, in the framework pioneered by Foucault, which examines discursive productions as a systematic linking up of

⁷⁸ It is important to note that Kapur and Cossman do not definitely answer their question of whether the law can be a subversive site in the affirmative. Rather, they contend that there is no definitive answer to their question. However, they do suggest that "the subversive potential of the law can only be discovered by constantly revisiting these hard questions, renegotiating the boundaries of law and reimagining our strategies" (Kapur & Cossman 1996, p.336).

⁷⁹ Kapur and Cossman are attracted to the various strands of post-structuralism which "reject the concepts of objectivity and neutrality, insisting instead that knowledge is a product of perspective and therefore always partial" (Kapur & Cossman 1996, p.33). For a discussion on alternative definitions of post structuralism see Benhabib et al 1995.

speech, acts, texts, and practices – all of which are forms of power, even as they constitute a body of authoritative knowledge. For Foucault each discursive site is an area in which resistance is both shaped by the nature of the discourse and is absolutely necessary.⁸⁰ Such an application has been significantly developed by the work of Frug who has argued that “locating human experience as inescapably within language suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms ... legal discourse should be recognized as a site of political struggle over sex difference” (quoted in Kapur & Cossman 1996, p.34).

Kapur and Cossman state that they find approaching the law as a discourse useful because it enables them to view the law as a “system through which meanings are reflected and constructed and cultural practices organised (Finley quoted in Kapur & Cossman 1996, p.40). The advantage of this approach is it allows for interventions to be made into legal systems, where meaning and practices can then be *re-negotiated* to be able to include women. The critical element of such an approach is that relations of power are made transparent and brought to the fore of any analysis.⁸¹

By understanding the law as a discourse we can recognize law’s formidable power in constituting women’s gendered identities, while at the same time, searching for ways to use this discourse to challenge those constructions (Kapur & Cossman 1996, p.41).

This dualistic nature of the law becomes a central tenet of Kapur and Cossman’s theoretical approach. Like Smart they perceive the law as “operating on a number of

⁸⁰ Smart in her discussion of Foucault (1990, pp.2-6), suggests that Foucault views the law as a left-over remainder of older regimes of power based on rights and punishment, and so the law remains as a counterpoint to the newer mechanisms of discipline Foucault discusses (1990, p.3). But Kapur and Cossman, in their approach to law as a subversive site, are able to use a Foucauldian type analysis to replace the old form of power in law (which relies on a legal Truth as determined by patriarchal values), with a concept of law that provides a means for contesting meaning (power) and thereby incorporating alternative accounts in the law.

⁸¹ See Otto (1997) who emphasises the importance of using post-structuralism to “move the contestation of inequality from a paradigm difference to one of power” (Otto 1997, p.24).

dimensions at the same time [arguing that the] law both facilitates change and is an obstacle to change" (Smart quoted in Cossman & Kapur 1993, pp.285-286).⁸²

However, Kapur and Cossman, in drawing on western feminist debates, do not uniformly apply western analyses to the situation for women in India (1996, p.35). As Rekha Chowdhary (1994, p.183) has noted, to do so is not always helpful in understanding the realities of Third World countries which often differ greatly from the realities of the First World.⁸³ For instance, some of the crucial areas of difference for women in India are the issues of caste, race, colonial history and poverty, and to adopt a theoretical approach that does not account for these dimensions is bound to remain ineffective. Vasuki Nesiah, in contrast, argues that feminist scholarship needs to analyse the tensions and shared understandings between women of the First World and the Third World, but also locate the experiences of women within their own local contexts (Nesiah 1996, p.26). Kapur and Cossman follow the approach advocated by Nesiah, and others such as Angela Harris, who argue for an anti-essentialist perspective that does not reduce women's oppression to universal factors, but examines the multiple and shifting dimensions of women's oppression, based on issues of race, religion, and other factors (Kapur & Cossman 1996, p.34).⁸⁴

⁸² Otto (1997, p.43) also identifies this contradiction in the law in her discussion of developing notions of universality in the human rights discourse. The potential of such a contradiction has also been discussed in terms of 'marginal spaces' in the literature on 'politics of location' discussed by Adrienne Rich, Michelle Wallace and hooks (1981, 1984) (see discussion in Kaplan 1994, p.141-150). "In identifying marginal space as both a site of repression and resistance, location becomes historicized and theoretically viable – a space for future possibility as well as nuanced articulation of the past" (Kaplan 1994, p.144).

⁸³ See also Mohanty (1991 (b)) and Johnson-Odim (1991) on this point. Women of colour in North America and England have also criticised western feminists such as MacKinnon for universalising the realities of women's conditions and thus negating the multiplicity of difference that exists among the situations for women. See Kline (1989) who takes up arguments of African-American writers such as Esmerelda Thornhill and bell hooks (1981) in her critique of MacKinnon on this point. Also note that African-American writers have extended this argument by locating the issue within the domains of racism: "black women are not accusing white feminists so much of ethnocentrism, which could perhaps be corrected by extending the field of vision, but of a crushing, institutionalized racism which is so deeply entrenched in our ways of thinking and being that we cannot see clearly how we help to justify and perpetuate it" (Ramazonoglu quoted in Kline 1989, p.116, f.n. 4).

⁸⁴ Grewal and Kaplan (1994, p.11), in their discussion of transnational feminism, cite the arguments of cultural studies proponent Stuart Hall who argues that the return to the local as a response to the seeming homogenisation of culture at the global level can only work for social change if the view of the local does not become rooted in glorifying the local.

Importantly therefore, although post-structuralism is an important influence in the development of Kapur and Cossman's theory, it is not the only tool of analysis employed. Kapur and Cossman also draw considerably on feminist experience from within India.⁸⁵ In examining feminist debates within India Kapur and Cossman attempt to address the criticisms women in India have made of working with the law for the purposes of social change.⁸⁶ Some Indian feminists (Agnes (1998), Ramanathan (1998)) have criticised the use of legal strategies for the advancement of women because of the patriarchal nature of the law, which prevents women from receiving justice through the legal system.⁸⁷ Judicial attitudes (ie patriarchal notions of the image of Indian women and their chastity) have often been used as evidence of the patriarchal nature of the legal system. For example, in *Yogeshwar Prasad*⁸⁸ the court held that a wife's chastity is relevant to determining the quantum of maintenance but it cannot be the basis for refusing maintenance (cited in Gopal 1993, p.77). Mukhopadhyay (1998) argues that some women activists have come to view the legal system as inherently problematic for meeting women's needs.

...given the patriarchal nature of the State, and given the reflection of such bias in the framing and dispensation of justice by the judiciary and its functionaries, it is not sensible to argue that law can ever be a potent force of change in the existing social structure: that the hope of ensuring gender justice using law as an instrument of social engineering is an altogether impossible dream (Mukhopadhyay 1998, p.11).

In contrast, Kapur and Cossman outline the arguments of those who support engaging with legal strategies. The *Towards Equality Report* identified the law as one of the main instruments for achieving social reconstruction, development and nation building in post-colonial states such as India (cited in Kapur and Cossman, 1996, p.24). The All India Democratic Women's Association supported this positive view of the law in their statement that the demand for law reform "forms

⁸⁵ Kapur and Cossman draw on the work of feminists such as Nair (1996) and Agarwal (1994) on women's property rights, Agnes (1998) on violence against women, and Parashar (1996) on family law.

⁸⁶ Some of these criticisms are outlined in the previous section in this chapter.

⁸⁷ One can see parallels here with the frustrations experienced by western feminists dealing with patriarchal legal systems in western countries.

⁸⁸ 1981 AIR at 99.

the backbone of any movement for progress” (quoted in Kapur & Cossman 1996, p.67). Kapur and Cossman draw from this legitimisation of the role of law in social change, a foundation for developing their new concept of the law as a subversive site.

Kapur and Cossman draw on both post-structuralist debates outside India and feminist debates and experience from within India to develop a theoretical framework which can counter the patriarchal nature of the law. Kapur and Cossman are able to replace the traditional view of the law as a dichotomous, adversarial domain, with a view of the law as a contestive site which enables existing power relations in society to be challenged rather than reinforced. This approach allows for a multiplicity of views, including women’s, to be incorporated into any legal forum.

Importantly, law, as a subversive site, can be effectively used in the context of the rights-based approach to law and development. Kapur and Cossman, having examined the critical debates of human right discourse, come to see the rights discourse as being integrally linked with their view of the law as a subversive site. “[R]ights debates have advanced the understanding of both the limits of law and possible uses of law in light of those limits” (Kapur & Cossman 1996, p.290). The subversive potential they identify in law offers a more effective means for women’s rights to be negotiated.

By approaching the law from the position that recognises it to be a discourse, women can attempt to ensure that the law does recognise the multiplicity of women, and is not limited to universal objective criteria. Approaching the law as a subversive site, allows us to render a more sophisticated rights discourse based on a feminist analysis of the law. The women’s movement must embrace such an understanding of the law, if they are to continue using the law as a relevant and appropriate mechanism for substantially changing the conditions for women. Kapur and Cossman’s perspective provides a resurgence of hope and possibility for legal strategies for women.

3.3 The Potential of the Future

The contemporary feminist legal perspectives in India, supplement the rights-based approach to law and development, and open up new spaces for women to engage with the law for the purpose of social change. One of the characteristics of these new perspectives has been the focus on practical and political action. Parashar (1996) calls for legal feminists to explore how the changes we desire can be translated into political action.

... legal feminists' analysis of law must be politically relevant as we are responsible for identifying how law may help in ending the oppression of women. If all that legal feminism does is identify law as an exercise of power, and therefore not much use to the majority of women ... then legal feminism cannot fulfill its potential as a social movement (Parashar 1996, p.36).

Complementing this call, Rao (1996, p.322-333) argues that by using a feminist legal theory approach, where law is seen as a site for contestation, human rights for women can be actively fought out and demanded, not just in terms of law reform, but in terms of the actual achievement of human rights in the form of access to water, health, housing, income, and land.⁸⁹

The problem is ... more comprehensive than recourse to courts for the enunciation of new rights and dramatic democratisation of judicial remedies. Other creative experiments in law – such as legal aid and legal literacy programmes, *lok adalats* (direct plagerisation and vulgarisation of people's law and justice) need literally to be 'hijacked' by the activists for their own purposes (Baxi 1986, p.47).

In order to advance we must acknowledge the problems of the past. The historical context of the Indian women's movement and the discussion of the contemporary women's movement in this chapter have been critical in identifying the limitations of the law, and the associated frustrations women activists have experienced. The concept of the law as a subversive site does not remove all the limitations of law, but by enabling women to contest their position in the law and to contest the meanings

⁸⁹ See the discussion of new strategies in Kapur and Cossman (1996, pp. 322-333).

constructed in law, it can enable women to protect their rights more effectively within the limitations of the legal system. The case studies presented in Chapter Four are practical demonstrations of how women have approached the law as a subversive site, consistent with a rights-based approach to law and development. In the light of the current economic domination of law and development, it is becoming critical for women activists and development workers to continue to engage with the law to ensure that, by adopting a rights-based approach, the rights of women are protected in the face of economic globalisation.

4. THREE CASE STUDIES

Chapter Three reflected on the frustrations experienced by the India's women's movement, as a result of legal strategies often failing to translate into tangible benefits for women. However, the legal strategies explored in these case studies are examples of where women in India have successfully obtained tangible developmental benefits from engaging with the legal system. These case studies are able to locate the theoretical alternatives discussed in Chapters Two and Three (ie viewing the law as a subversive site, within a rights-based approach to law and development) in the practical experiences of women in India.

While discursive categories [ie human rights, the law], are clearly central sites of political contestation, they must be grounded in and informed by the material politics of everyday life, especially the daily life struggles for survival of poor people – those written out of history (Mohanty 1991(b), p.11).

In January 1997 I visited a selection of voluntary organisations in Maharashtra and Gujarat. I found that organisations such as the Self-Employed Women's Association (SEWA) were using creative legal strategies to enforce women's rights in India, for the purpose of affecting social change. I draw on the experiences of my visit, as well as activist and academic material to develop each case study.

The three case studies are: (i) unionisation in the informal sector; (ii) women's representation in the Panchayati Raj institutions; and (iii) Social Action Litigation (SAL). Each case study demonstrates alternative possibilities for legal intervention. The unionisation case study examines women's issues in the area of industrial relations and participation in civil society. The Panchayati Raj case study looks at women's role in the area of political governance. Lastly, the case study on SAL examines court administration and procedures and access to the legal system.

The case studies may at first sight seem to be isolated examples, drawn out of context. Although there is an element of that, these examples are not isolated

exceptions in India. The unionisation model has been used by civil society organisations for over twenty years, and is being re-created in different states in India, in sectors ranging from bidi (hand-rolled cigarettes) workers and subziwallis (female vegetable vendors), to rag pickers.⁹⁰ Similarly, the reservations for women in Panchayats is a national scheme being implemented throughout India. Lastly, SAL has been implemented in a variety of sectors ie bonded labour, children in custody, education environment, legal aid, pollution, slum dwellers, sati, women in custody, prison conditions and medical care.⁹¹ The scope of this thesis only enables me to capture a sound-bite of each situation – a specific time in people's lives when the situation has intensified the possibilities for change.

These case studies are analysed in Chapter Five in the context of demonstrating the practical capacities for implementing a rights-based / feminist approach to law and development, and in terms of considering some of the practical possibilities for concepts such as human rights, democracy, good governance and civil society in the field of law and development.

4.1 Case Study 1: Unionisation in the Informal Sector

93 per cent of workers in India work in the *informal sector* (or the unorganised sector), 60 per cent of which are women (SEWA (a) n.d., p.1). The informal sector is a vast system of small producers, vendors, and service providers, who are officially not engaged by any employer. Workers in the informal sector belong neither to the private sector nor the public sector. They do not work for any established companies or enterprises but may be linked to such enterprises through subcontract arrangements (SEWA (a) n.d., p.1). The Report of the Commission on Rural Labour's definition for an *informal sector worker* is:

⁹⁰ For examples of other sectors in which the model has been successfully re-created see Rose (1992).

⁹¹ For a collation of SAL judgements which demonstrate the variety of legal issues this mechanism has been used to address see Antony (1993).

2. Such own account workers who are not usually hiring in [sic] laborers but are a part of the petty production system (cited in SEWA (a) n.d., p.1).

Informal workers are found in a range of sectors including: manual work like construction labour; home-based work (eg piece-rate work); service providers such as washerwomen, scavengers, and domestic helpers; petty vendors and hawkers; and general labouring work (*The Report of the National Commission on Self-Employed Workers and Workers in the Informal Sector* cited in SEWA (a) n.d., p.1). Common to all women working in the informal sector is that they are not officially recognised as employees. Consequently many women working in this sector are unable to avail themselves of industry protections, security or conditions of labour, such as a minimum wage, which are normally attributable to all workers in the formal sector.

The union which has been doing extensive work based on this model is the Self-Employed Women's Association (SEWA). SEWA is a trade union for self-employed women based in Ahmadabad, Gujarat. SEWA has been organising women working in the informal sector to unionise since 1972, as a means to improve their working conditions and their economic and social status in life.⁹² In accomplishing this SEWA has often successfully utilised legal strategies, in conjunction with education, training, awareness raising sessions and public demonstrations. I describe in detail here two examples of SEWA's work in unionising the informal sector.

Bidi Workers⁹³

SEWA first worked with women home-based workers in the bidi industry in 1978. The average bidi worker works for about eight hours a day. She obtains the necessary raw materials - tendu leaves (a dense evergreen tree) and prepared tobacco

⁹² Ms Chikarmane (SNDT Campus, Pune, personal interview, 1997) informed me that, in her experience, the union model was first used 30-35 years ago when the head loaders in Pune established a union. As a result of which, they were able to establish a formal employer-employee relationship with the railway stations, enabling them to demand adequate wages and occupational health and safety measures.

⁹³ The information for this case example was gathered from discussions with Manali Patel (personal interview, 1997) and from Rose (1992, p.121-129).

– from the contractor in the morning. Then, with the materials for assembling a bidi, in a flat tray in front of her, she sits on the floor of her house, and prepares the bidis. The work involves cutting the tendu leaves to size, soaking them, filling them with tobacco, folding the edges and tying them with a thread. On average, one woman rolls approximately 800 bidis in a day. To fill the quota, she often has to call upon the unpaid assistance of the other women and children in the house.

SEWA first began the bidi workers movement with a group of workers in Patan, Gujarat, who were working for Rs 4 a day. The bidi industry was at the time regulated by the *Minimum Wages Act (1966)*, the *Bidi and Cigar Workers Act*, and the *Bidi and Cigar Welfare Fund Act (1977)*. These laws obligated employers to provide a minimum wage of Rs 31.5/1000 bidis, and maintain certain conditions of work, including providing maternity leave and creche facilities. Under the legislation the Government was obligated to provide medical services and housing for the workers and scholarships for the workers' children.

The principal employers involved in the business had employed the bidi workers under complex subcontracting systems, in order to evade their legal obligations as employers. Those manufacturers who directly engaged the women did so on a sale-purchase system (ie the woman purchases the raw material and then sells the completed bidis back to the manufacturer), thereby by-passing the employer-employee relationship which would have obligated the manufacturer to meet the legislative requirements.

Another means of evading legislative obligations was for the manufacturers to enroll false names, which they changed at regular intervals so that there were no records of long-term workers who may be eligible for long-term benefits like scholarships or gratuity funds. Sometimes the women were recorded under male names to avoid attracting any legislative obligation to provide maternity benefits. One of the significant disadvantages of not being enrolled as a worker was the subsequent denial of a worker identity card. Without the worker identity card, the women were unable

to avail themselves of the services of the medical facility set up in Patan under the *Bidi Welfare Act*.

There was no enforcement of the relevant Acts by the Labour Department, who were even unaware of the numbers of bidi workers in the State of Gujarat. The first step by SEWA in assisting the bidi workers, was to establish a union for the bidi workers under the *Trade Union Act*. This was a critical step in mobilising women to protect their legal rights.

The next step was to raise the legal awareness of the women. Many of the bidi workers were unaware of their legal rights, many did not even know there were minimum wage levels that applied to their industry. The bidi workers requested classes on labour laws and labour court procedures. SEWA arranged for the Central Board of Worker's Education to conduct these classes.

Once they had agreed to act collectively and had informed themselves, the women then took community action. The women, with SEWA, organised for 700 women to gather and march through the streets, demanding minimum wages. This was an important action in terms of politicising the issue in the general public sphere. These series of actions were successful in getting the Labour Department to raid the contractors' shops and file cases against them. By 1987 the bidi workers had collectively negotiated an increase in income from Rs 5 to Rs 13 per 1000 bidis.

Subsequently further action was taken against Jiveraj, the largest brand bidi seller in Gujarat. This was an innovative instance of women initiating legal strategies to claim their rights. The workers put together a SAL claim against Jiveraj for not meeting the legislative requirement for a minimum wage. There were approximately 180 workers who were party to the SAL claim. Jiveraj argued that they were not liable under the Act because there was no employer-employee relationship between the bidi workers and the bidi distributors, but rather a buyer-seller relationship as the

bidi workers bought the materials from the distributors and sold the finished product to the distributors.

It became essential to establish that the bidi workers were not self-employed workers in the informal sector but rather that they were a legitimate part of the formal work force and that they were employees to the bidi distributors. This was important not only to establish a minimum wage, but also to attract the rights of an employee as determined by labour laws relating to job security and health benefits.

To establish that there was indeed an employer-employee relationship between the bidi workers and the distributors, the women worked with the Labour Department to gather evidence of the relationship. The women were able to establish that they worked for specific distributors by showing that they only produced a particular brand of bidi, which was distinguishable by coloured threads provided by the distributor. The distributors retaliated by sending goondas (in this context meaning hired thugs) to the women's houses to physically intimidate the workers, and to destroy all the identity cards that were also to be used as evidence. The distributors were assisted in this by the non-intervention of the police.

Nonetheless, with the evidence of branding, one identity card which was saved from destruction by the distributors, and with much communal agitation which was used by the women to counteract the physical intimidation, the women were able to obtain a judgement in their favour. The result was a Court agreement which requires the bidi distributors to meet annually with women workers to negotiate fair costs. Although the women are still not receiving the minimum wage, each year meetings are held between SEWA representatives, the bidi workers union, the employers and the Labour Department, at which the wages are reviewed and incrementally increased towards the target of the minimum wage of 31.5 rupees per 1000 bidis (equivalent of \$1.00 for about one day's work).⁹⁴ Furthermore, having established themselves as

⁹⁴ Unfortunately I did not have information available as to whether there were any negative flow on effects as a result of the increased wages the women were able to negotiate. For example, whether the number of jobs were reduced, or whether other the employers lost profits as a result of the increased

valid employees, the women were entitled to receive identity cards, enabling them to access medical services and low cost government housing, as required under the operating legislation.

Vegetable Vendors

In this example, a group of vegetable vendors from Manek Chowk, Ahmadabad, worked together to stop the harassment they were subjected to, by local council officials, police and other shopkeepers, for selling their goods on the sidewalks at the market. The vendors formed a union under the umbrella organisation, SEWA. On behalf of the vendors of Manek Chowk, SEWA made a writ petition against the Municipal Corporation claiming that by denying the petitioners licenses, the municipality was violating the hawkers and vendors fundamental right to trade.

The Supreme Court, finding in favour of the vendors, ordered the Municipal Corporation to issue licenses to all SEWA members in Manek Chowk and work out a compromise solution with the vendors. The municipal corporation offered to situate the vendors on the terrace of the municipal market. The vendors agreed, subject to the provision of a wider staircase, a roof, and light and water facilities. The court accepted the agreement and passed judgment in 1984.

As of January 1997 the municipal corporation had failed to put in place any of the refurbishments requested. Nor has the police harassment ceased. As of 1992, 103 cases of police harassment and obstruction had been filed and 45 police bribes returned to the vendors. On the other hand the vegetable vendors have chosen not to move into the allocated building because, they say, the stair access and lighting is not adequate. In personal interviews with the vendors it became apparent that another reason for not moving was that, if the vegetable vendors were to move, they would lose their prime selling positions (in front of the shops) they currently occupy on the

costs of production. It is important to take the flow-on effects into account because sometimes their impact can be even more detrimental in the bigger picture.

sidewalks. Nonetheless, the vendors and hawkers can continue to sell their wares from the sidewalk, with somewhat less harassment, and SEWA continues to support its members to address the harassment through a combination of legal and other strategies.

In both the bidi workers and the subziwallis cases the socio-economic benefits have been considerable, but the empowerment of the women has been even more impressive. Kalima Rose captures the essence of the impact of such progress on women in the following description –

A woman who 10 years ago never ventured out of her house, but sent her son to collect tobacco and tendu leaves from the contractor so that she could support herself and her children by rolling bidis would not have been able to introduce herself. She would have told us that she did not work if we asked her about what occupation she was engaged in. Since her alliance with SEWA, she has grown from being able to speak her own name into the definition of a bidi worker. Her consciousness expands to recognise herself as a unionised worker. She then says loudly ‘I am a worker. Recognise me. I work at home. Recognise my work place. Grant us the protection we need in our work. We want dignity not desperation - our work should provide us this’ (Rose 1992, pp.33-34).

4.2 Case Study 2: Women’s Representation on Panchayats

The government of independent India introduced universal franchise and the right to stand for election in 1950. In 1984, 58.6 per cent of voters in India were women. In 1991, women formed 5.2 per cent of the membership of the Lok Sabha (Lower House of Indian Parliament) and 9.8 per cent of the membership of the Rajya Sabha (Upper House of Indian Parliament) (Rai 1997, p.263). These figures demonstrate the disproportionate representation of women, who form approximately half of the Indian population, in India’s institutions of governance.

In 1992 the Indian Parliament passed the *Constitution (Seventy-Third Amendment) Act* which incorporated the Panchayat system of local rule into Part IX of the Constitution. These village Panchayats have responsibility for water supply,

sanitation, lighting, maintenance of roads, land management, collection and maintenance of records and statistics, and the welfare of backward classes (Bajpai 1997, p.15). The 73rd Amendment has been an important measure in strengthening this local level of governance. The most important provisions include: the requirement for regular elections to be held at village, intermediate, and district levels; the requirement for one third of seats on all Panchayats to be reserved for women; and the requirement for seats to be reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs). The reservations for women SCs and STs include the position of Chairperson and representation on the Constitution of Finance Commission (which enables women to be part of the decision making body which allocates resources to Panchayats). In this case study, the focus is on the component of the Amendment that reserves places for women on Panchayats and the results which have followed.⁹⁵

The Amendment to reserve places for women on Panchayats has been adopted in each State and State elections have been held in most States. In Orissa 25,000 women were elected into Panchayat bodies. In Uttar Pradesh 15,000 women were elected. In West Bengal and Karnataka the quota for women was exceeded, with women representatives forming 35 per cent and 43 per cent of total seats in those States respectively (Mohanty 1995, p.3348). In Maharashtra nine all-women Panchayats were elected (Mohanty 1995, p.3349).

Some women representatives have been successful in ensuring women's concerns have been raised at the Panchayat level. Panchayats in Orissa have succeeded in making improvements in the provision of sanitation, literacy, old age pension and family welfare (n.a. *Panchayati Raj Update*, 1998, p.4). The success is especially notable in the case of all-woman Panchayats. In Brahmanagarh, the all-woman Panchayat has been supported by local voluntary organisations to shift the developmental priorities of the village (Mohanty 1995, p.3349). The Tripura all-

⁹⁵ For an overview of the history of women in Panchayati Raj institutions, see Vidya (1997, pp.37-72).

woman Panchayat has set eradication of illiteracy as its top priority. The women in the Kultikri Panchayat have utilised wasteland resources to set up mango and shrimp farms for income generation projects. Women's leadership in the Panchayat in Vitner has resulted in drinking water being made available through taps and a reduction in the levels of alcoholism (Mohanty 1995, p.3349).

However, it has also become evident that there is a large lack of capacity among women at the village level to fill the reservation quotas. The National Commission for Women undertook an awareness campaign for rural women on this issue and their findings were as follows:

Traditionally, rural women are confined to child bearing, child rearing and household duties and work outside only to the extent assigned to them. Their participation in public life is minimal. As a result, women suffer from an innate sense of bondage and dependence. They have a low self-esteem and start with the premise that they cannot do many things which the menfolk can do and further they are not designed to do several things which lie exclusively in the (public) domain of men...the rural women...have to be made aware of their immense potential and capability. The quality of leadership has to be encouraged...so that women can develop confidence in decision making, can identify their own problems, priorities and preference and use their own wisdom, knowledge and judgment to suggest ways and means to resolve them (National Commission for Women n.a., p.2).

Another issue, which has obstructed the implementation of the Amendment, has been the strong community resistance (on a gender and caste basis) against women becoming Panchayat members. For example, Gundiyabi Ahirwar in Madhya Pradesh is a Dalit woman, Sarpanch (chairperson of the Panchayat) of her Panchayati Raj. She is illiterate and is forced to rely on her husband to make all the financial decisions on the Panchayati Raj. Kumni Devi of Phuter belongs to the Chamar (low rank caste) community in a village dominated by the Lodh (caste category higher than Chamar) community. Despite being Sarpanch of the Panchayati Raj, because of her social position as a Chamar woman, she is required to approve anything a member of the Lodh community may bring to her. She is not consulted on the

agenda or meeting place for meetings. Most meetings are held in the evenings and there are no safety provisions made for her. As she says “they just tell me when to put my angoota chhap (thumb print) on the paper and I do that” (Sainath 1988, p.6).

To increase women’s capacity in this arena, the National Commission for Women, women’s organisations, and other voluntary organisations have been conducting training programs for women candidates participating in the election.⁹⁶ ACORD (Asian Centre for Organisation Research and Development), for instance, has worked with 453 participants over four years, from twenty-five States and United Territories in India, on Panchayati Raj and gender sensitisation (n.a. *ACORD News*, 1998).

A training program undertaken by a volunteer organisation called Centre of Concern for Child Labour (CCCL) in Domariaha (a village in Chatra Block, Bihar) and in Sotil (a village in Ghorawal Block, Bihar), in September 1996, found that initially there was a lot of resistance in the village to the trainers, particularly from some of the male Panchayat members who felt their leadership and control over the women was threatened. The limitations to women’s participation in the Panchayati Raj, as identified by the women themselves, included: illiteracy; lack of audio-visual materials explaining the functions of the Panchayat Raj; lack of child care facilities; and lack of respect from male Panchayat members (CCCL 1996). The training workshops sought to address these issues.

Both government and non-government training programs have found that many of the women elected to Panchayats are illiterate and largely ignorant of the mechanisms of local self-government. Furthermore, many women operate under the influence of the prevailing male representative of their family. Some husbands were even given the title of Sarpanch-pati (Chairperson’s husband) (NCAS 1996). In the *Towards Equality Report* it was noted that although women are considerably

⁹⁶ Some of the organisations involved in this campaign have included – CWDS (New Delhi), Institute of Social Sciences (New Delhi), FES (New Delhi), Sampark Samiti (Maharashtra), FAOW (Bombay), NIRD (Hyderabad), Institute of Social and Economic Change (Bangalore), UPVAN

influenced by their husband's and families wishes in political matters, there has been some evidence of changing trends in this, primarily in the area of women feeling confident in casting secret ballots (from extracts contained in Mazumdar 1979, p.354).

A fundamental aspect of the training programs has been getting women to identify themselves as individuals, rather than in terms of their family status. In addition to building up their confidence, in working as individuals, the women have had to learn about handling the capital assets and funds of the Panchayat. The objective of the training has been to equip the women with the knowledge of existing Government schemes. With this knowledge they would be able to respond to their constituent's demands in the areas of infrastructure development, education and culture, health, environment, legal protection for women and children, employment, agriculture, livestock and forestry (n.a., *Training Support to Women in Panchayati Raj Institutions*, 1994).

As demonstrated by the examples of the successes described earlier, once educated, informed, and mobilised, women have used this legislated opportunity to make changes in the governmental structures and policies, leading to tangible developmental benefits for women (Mazumdar 1979, p.83).

4.3 Case Study 3: Social Action Litigation (SAL)⁹⁷

This discussion of SAL illustrates the potential of the law to be a more accessible and justiciable institution. SAL was a key component of the case study on unionisation,

(Lucknow), CWDS (Bihar), SUTRA (Himachal Pradesh), Dandekar School of Political Economy (Pune), FES, PRIA, Manushi.

⁹⁷ Initially and more commonly termed Public Interest Litigation (PIL), both Chief Justice Bhagwati and Upendra Baxi, the two leading proponents of PIL have called for its renaming from PIL to social action litigation (SAL). Thus drawing a distinction between the American Public Interest Litigation model and what has emerged as a quite distinctive model in India. In America PIL is concerned with civic participation in governmental law making, rather than with state repression, government lawlessness, or resource distribution, as SAL is in India. Baxi has argued that to use the term PIL, would be to "continue to obscure a genuine appreciation of the distinctive social and historical forces shaping the role of adjudication in India" (Baxi 1987(b), p.34). Baxi proposed the use of SAL rather than PIL and this was supported by Chief Justice Bhagawati (Baxi 1987(b)). In accordance with this development I use the term SAL rather than PIL in this thesis.

in relation to both the bidi workers and vegetable vendors examples. SAL is an important example of new strategies being used by the judiciary and courts to address the criticism that the law is not an accessible avenue for disadvantaged people in India.

Social Action Litigation, although not uniquely a creature of Indian public law, has achieved an identity of its own in the jurisprudence of the subcontinent. The emergence of the concept and, even more strikingly, its unrepentant dimensions in the current practice of Indian courts, clearly conflict with traditional norms of judicial detachment and objectivity, (and) represent a bold but controversial response to the perceived implications of social inequality and economic deprivation (Peiris 1991, p.66).

Traditionally, Indian law has adhered to the rules of standing based on the British legal system (ie only those whose rights are directly affected by a law can raise the question of the constitutionality of that law) (Craig & Deshpande 1989, p.357). Similarly, under the traditional rules of *locus standi*, judicial address was only available to those who had suffered a violation of a legal right or a legally protected interest by the action of the state. Breach of such a legal right was a condition precedent for invoking the jurisdiction of the Court. But these traditional rules were born in an era “when private law dominated the legal scene and public law had not yet been born” (Bhagwati CJ quoted in Craig & Deshpande 1989, p.359). In addition to which, these rules, which were inherited from the British system, no longer met the needs of a developing country like India (Craig & Deshpande 1989, pp.358-59).

As a direct result of the State of Emergency declared by Indira Gandhi’s Government in 1975 (Grover & Arora 1993, p.668), there was an explosion of energy directed towards the use of courts to advance social justice and human rights.⁹⁸ In this climate, the Supreme Court of India undertook boldly to make itself more accessible to those unable to obtain legal representation (Cunningham 1991, pp.789-790). Beginning around 1980, the Supreme Court made a number of exceptions to the

⁹⁸ 1970s was also a time when there was increasing inequality, poverty and alarming rates of violence against women and violations of people’s human rights (Chowdhary 1994, p.181).

traditional doctrines of standing, including allowing third parties to appear where the principal party suffered some disability (whether arising from minority or of a physical nature). In 1982, in *Gupta v Union of India*⁹⁹ Bhagwati CJ of the Supreme Court outlined the foundation principle for the future development of SAL:

It may therefore now be taken as well established that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reasons of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision without authority of law, or any such legal wrong or legal injury or illegal burden is threatened, and such person or determinate class of persons is by reason of poverty, helplessness or disability or (a) socially or economically disadvantaged position unable to approach the court for relief, any member of the public can maintain an action for an appropriate direction, order or writ (on their behalf)...(quote from *Gupta v Union of India* AIR 1982, SC 188, in Craig & Deshpande 1989, p.360).

The only recognised caveat to this is that if those primarily injured do not wish to claim relief, and accept the illegality “willingly and without protest”, the member of the public who complains of secondary public injury cannot proceed (Craig & Deshpande 1989, p.362).

The Court has introduced two major changes to administrative procedures to support the new SAL measures. Firstly, to ensure accessibility, on some occasions, the Court has foregone traditional methods of filing writ petitions and accepted newspaper articles, social science reports etc as writ petitions (Cunningham 1991, p.790). For example, a writ petition was filed in the Supreme Court by an advocate on the basis of a news report that many inmates in the jails of the State of Bihar had been awaiting trials for several years. The Court received and acted on this writ (Sorabjee 1993, p.33).

The second court procedure introduced was the practice of appointing investigative commissions to gather facts and data in relation to a case. This far reaching and distinctive characteristic of SAL was also introduced in the *Gupta Case*. The

⁹⁹ AIR 1982, SC 149

principle behind this, as identified in that case, was that where the poor (who were the real plaintiffs in this action) could not produce the relevant material supporting their case before the Court of their own accord, the Court could appoint commissioners to gather facts which would assist the judicial process (Craig & Deshpande 1989, p.364). The Court takes the findings of the commission into account in its adjudication on the matter (Sorabjee 1993, p.32). Thus, in *Kutti Padmarao v State of Andhra Pradesh*,¹⁰⁰ the court appointed a commission to visit the lands and families who had been relocated, to assess the adequacy of their relocation in comparison to their original position. This is a critical characteristic of SAL as the Courts have emphasised the importance of completeness of information as the key to effectiveness in SAL (Peiris 1991, p.80). For SAL to be socially relevant, the Courts have insisted that the respondent State see itself as a protagonist in the collective quest for social justice, and collaborate to that end with the petitioner and the court in the spirit of openness and self criticism (Peiris 1991, p.72).

Chief Justice Bhagwati of the Supreme Court, who has given his support and active engagement toward the development of the SAL, has become almost synonymous with SAL. Bhagwati CJ stated that his motivation for enacting and defining SAL measures comes down to making the law an accessible tool for the poor.

The weaker sections of Indian humanity have been deprived of justice for long years; they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of their rights and benefits conferred upon them by the constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights, and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice (*Bihar Legal Support Society v Chief Justice of India* [1986] 4 S.C.C. 768 quoted in Peiris 1991, p.66).

Bhagwati CJ has gone further to argue that the Directive Principles of State Policy (Part IV of the constitution),¹⁰¹ would be “meaningless and ineffectual” unless they

¹⁰⁰ [1986] (Supp.) S.C.C. 574

¹⁰¹ These Directive Principles contain the social and collective rights the State is required to observe in its legislation and implementation. See Appendix 3.

can be taken into consideration in the determining of the content of rights of Part III of the constitution (Craig & Deshpande 1989, p.361). Speaking about the rights in Part III of the Constitution and the Directives in Part IV, Bhagwati CJ says,

These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State – neither the Central Government nor any State Government – has the right to take any action which will deprive a person of the enjoyment of these basic essentials (*Bandhua Mukti Morcha v Union of India* AIR 1984 S.C.C. 812 quoted in Craig & Deshpande 1989, p.362).

Conceived of as a protective strategy for the poor, the Indian courts, through SAL have actively evaluated the structure of India's social and economic institutions as an integral element of judicial decision making.

Along with the commendments for this approach, the Court has been criticised by judges, lawyers, administrators and academics for adopting SAL. I discuss the criticisms of SAL in Chapter Five. The impact of SAL in India has been well summarised by Baxi:

The Supreme Court of India is at long last becoming, after thirty two years of the Republic, the Supreme Court for Indians. For too long, the apex constitutional court had become 'an arena of legal quibbling for men with long purses'. Now increasingly, the Court is being identified by Justices as well as people as the 'last resort for the oppressed and bewildered'. The transition from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary (Baxi 1987 (b), p.32).

5. THE LAW – A MEANS TO DEVELOPMENT

Legal rights by themselves may not change the economic system but in some situations they can transform the economic position of women (Dahl cited in Parashar 1992, p.29)

The concluding argument drawn in this final chapter is that the law is a useful framework which women in India can successfully use to overcome a range of barriers that contribute to their absolute poverty. The analysis of the three case studies in this chapter demonstrates the practical possibilities for the alternative theoretical perspectives analysed in Chapters Two and Three. The three themes of the analysis in this concluding chapter are (i) how a rights-based approach to law and development can take form in practice in a way that ensures women's needs are addressed (ii) how the law can be approached as a subversive site for women in practice and how that can support a rights-based approach (iii) how the law can operate as a dependent variable for change, and what are some of the non-legal factors which the law depends upon to be able to work towards social change.

All three case studies have been extensively documented and implemented in India for sometime – for over two decades in the case of the unionisation case study. The unionisation cases have been well documented by SEWA and others, but mostly in the context of what benefits women can obtain by working in unity. The debate on the reservations for women has tended to focus on the capacity of women and what support programs they may require. The SAL literature has focused on the nature of the changes to the administrative procedures and the extent to which the judiciary may be stepping beyond its role in adapting India's legal system. Of all the case studies, the literature on SAL perhaps comes closest to being analysed from the perspective adopted in this thesis. The new path that I forge in my analysis of these case studies comes from examining them from within that marginal area which lies in-between the fields of women, law, and development. Viewing the case studies from within the broader field of law and development, but at the same time, retaining

a feminist perspective, brings with it a certain, distinctive, understanding of how law and development can be viewed.

The case studies are realistic instances of the theoretical arguments developed in Chapters Two and Three. Grounding theories in grass roots experiences in this manner reflects Kapur and Cossman's call to discover the subversive potential of the law, by "renegotiating the boundaries of law and reimagining our strategies" (Kapur & Cossman 1996, p.336).¹⁰² This also follows the tradition, in the field of law and development, of using country specific case studies to contribute to the development of a theory of law and development (Mehren & Sawers 1992, p.67). Ultimately these case studies are examples of *transformative practices*. Transformative in the sense that have "the potential to deradicalize the political claims of social movements" (Kapur & Cossman 1986, p.293) in the way that they translate political claims into a legal discourse.¹⁰³

Unionisation in the Informal Sector

The case study on unionisation in the informal sector demonstrates that marginalised women can use legal frameworks to participate in the formal sector of society and access resources that were previously denied to them because of their unrecognised status. As Kapur and Cossman's theory of law as a subversive site suggests, the case study showed that women could re-negotiate their position within the law. From their re-negotiated position the women were able to increase their participation in socio-economic institutions and access necessary resources. By engaging with the law in this manner the women were able to protect their fundamental human rights such as the right to work, right to just and fair conditions of work, and the right to

¹⁰² This approach is consistent with Foucault's recognition of local knowledges as sites of power and struggle (referred to in Otto 1997, p.25).

¹⁰³ Drucilla Cornell has defined the term *transformative* as: "change, radical enough to so dramatically restructure any system – political, legal, or social – that the 'identity' of the system itself is altered [and secondly] defined as broadly as possible, turns up the question of what kind of individuals we would have become in order to open ourselves to new worlds" (cited in Otto 1997, p.3).

form or join a trade union, (Article 24 UDHR).¹⁰⁴ Their actions in the legal sphere gave substance to the rights they claimed.

In recognition that India has a legal plural system, it is interesting to note the multiple levels at which the law operated, and the active negotiation the women were required to enter into at each level, to transform each level into a subversive site. Firstly there was the formal, court system, which was transformed into a subversive site by engaging in SAL claims. The use of SAL enabled the women to access the law and lay legal claims they otherwise may not have been able to.

Essential to their successful engagement with the law was the process of legal awareness training the women underwent. The training was a significant step because it raised the women's consciousness about legal rights. Importantly, the classes were also the first occasion many of these women had to be educated. It was an empowering event. Once armed with the information, the women were motivated to ensure that their rights were upheld.¹⁰⁵

The second level at which the law operated was in dispute resolution, where the women came to the bargaining table to negotiate their terms with their employers. In both the formal court system and the dispute resolution system the power balance between the bidi workers and the employers was in favour of the employers. The employers used the law to define the women as self-employed subcontractors, thereby denying them access to the law and employment benefits. Until the women were able to re-define themselves as workers within the legal system, this power balance did not shift. Similarly, in terms of the negotiating table, until the women had been able to get the Labour Department to support their position as workers, the employers were in such a powerful position there was no opportunity to even get them to the negotiating table. The workers are still not on the same power level as

¹⁰⁴ See Appendix 2.

¹⁰⁵ On this point Paul and Dias (1992, pp.299-305) discuss the development of groups' legal resources, in order to address the need for awareness raising and to foster knowledge on how people can defend their rights.

the employers. But by redefining their status as *workers*, the women were able to establish themselves as legitimate participants and set up a process of dialogue.¹⁰⁶

The third level falls in the arena of informal law, where the employers used goondas to physically intimidate the workers for challenging the status quo. Legal strategies at this level failed to counter the physical intimidation, because the police (by not intervening) supported the employers in their position. The women resorted to public protests to raise awareness of the issue in the community, so that the physical intimidation would not go unnoticed.

The women workers were required to use a variety of legal and non-legal techniques to establish a position of semi-equal power from which they could negotiate with their employers. This included public demonstrations, education, legal awareness, and court actions. All of these strategies were essential and could not, without the others, have achieved the same results. The bidi worker example demonstrates how the law can never be assumed to be the only strategy for civil society, but in conjunction with other mechanisms can be useful, to the extent that the State will allow civil society groups to use the law in such ways.

The unionisation case study demonstrates that in India civil society bodies can create effective interventions in the gap between legislation and implementation.¹⁰⁷ SEWA used the space created by the Trade Union legislation to address the lack of enforcement of the *Minimum Wages* Act and other Acts for the benefit of their bidi workers. But as the subziwallis' example illustrates, even successful legal strategies such as unionisation cannot always ensure legal decisions are enforced. I contend that the fact that the judgement failed to address the real issue of market space is the reason the court's decision has not been enforced. However, the court's decision has provided the vendors with a basis for establishing themselves as valid legal entities,

¹⁰⁶ The women now possess the power to transform their lives – from victims they have become agents. In line with Mohanty's (1991, p.38) discussion of *agency*, we can see how agency in this situation has arisen from opposition to domination.

¹⁰⁷ The gap between legislation and implementation in most cases arises as a result of a strong legislature and judiciary, but a weak executive.

thereby re-positioning the platform from which they can continue to contest their claim.

The unionisation case study is a practical illustration of the rights-based approach to law and development in practice. The case study demonstrates for instance, that legislation that ratifies international human covenant rights (eg *Trade Unions Act*) can be used to achieve developmental objectives. Legislators may not have intended the Trade Union legislation to be used in this manner, the creative use of this legislation by civil society groups such as unions, who have developed legal expertise in relevant areas, has led to health, education and income issues to be addressed. Such actions are also critical in terms of protecting the rights of disadvantaged groups in the current era of economic globalisation. The increase in the number of TNCs becoming employers in developing countries will require local groups to continue to develop transformative practices that protect their rights.

Incorporating democracy as part of the rights-based approach is another aspect which becomes visible in the unionisation case study. In India unions are considered to be important groups for political parties, because they are an efficient means of distributing information and mobilising people on a mass basis (Chikarmane, personal interview, 1997). Thus by establishing themselves as unions, women who in the past may have voted by giving their vote to their husbands, were now members of a politically active group. This demonstrates the close connection civil society can have with democracy in a practical context for women on the ground.

The unionisation examples also demonstrate how the feminist criticisms of law and development, discussed in earlier chapters, are addressed by ensuring that women's issues are included. The examples illustrate, for instance, how the divide between the private and public sphere can be destabilised as a result of women establishing a legal identity for themselves. Previously, the women, by virtue of being categorised as informal workers, were not granted the status of legitimate members of the public sphere, and therefore could not contest their position within this sphere. However,

by establishing themselves as members of a union, the women were able to remove the opaque veil of the private sphere and re-define themselves as active subjects within the public sphere.

These case studies support other research done that shows that vigorous trade unionism can contribute to overall economic development (Sklar 1996, pp.37-38). Strong unions negotiate contracts, which provide for the delivery of basic human needs including health care; housing and canteens for nutrition. Wage gains negotiated by unions also spill over into the wider economy.

There are several non-legal factors, which are alluded to in the above analysis, without which this legal strategy would not have been successful. These include: active and informed organisations in civil society (eg SEWA) who possess appropriate organisational and legal analyses; the existence of a benevolent state which tolerates a strong and active civil society (which though found in India, is not necessarily found in other developing countries eg Indonesia, Afghanistan etc); a strong democracy, stemming from India's independence movement; and a civil society that is able to work in educating the citizenry and thereby contribute to the strengthening of democratic values in society (Varma 1985, p.102). The impact of these non-legal factors in this case study demonstrates how the law acts as a *dependent variable* for social change, reliant upon these other factors to achieve social change.

Most importantly, these case studies demonstrate what practical, developmental, benefits can be obtained through the law. In each case study the law was being used to deny women access to necessary resources. By engaging with their legal situation, these women were directly able to increase their income and access health care, accommodation, and educational benefits for their children, which were previously being denied to them.

Women's Representation on Panchayats

The 73rd Amendment to the Indian Constitution, requiring the reservation of seats for women on Panchayats, contains significant potential for improving the status of Indian women. This provision does so because it goes substantially to increasing women's participation in governance at the local level and in promoting women's human rights. In doing so it also contributes to improving good governance and demonstrates how good governance can be used for positive developmental objectives.

In terms of looking at democratic participation in government it is important to examine social and political institutions which form barriers for women representatives (Rai 1997, p.270). Under the legislation, women who were previously excluded from participating in local governance forums due to social, financial, religious and political barriers, have now been sanctioned as legitimate actors in this sphere. This has not necessarily removed many of the barriers, but it has enabled women to redefine themselves as legitimate actors. By claiming this position, women are able to negotiate further to remove the other barriers. Importantly, such representation has also been essential for ensuring women's priorities are actively raised within the public sphere.

Women's representation in Panchayats has also been an important step in improving good governance in India. One of the ways of measuring effective good governance is by examining the level of participation of marginalised groups in decision making processes. The reservation provisions show that women are now involved in decision-making processes to a greater extent than before. Key elements of good governance – transparency, accountability, and open participation in elections – have also been promoted through this provision.

But more importantly, improving good governance, has led to positive development objectives for women. The *Towards Equality Report* found that women were more

concerned with problems that affect their daily lives than men. This included issues such as price rises, lack of essential commodities, black-marketing, adulteration, unemployment, and poverty (cited in Mazumdar 1979, p.355). This has been borne out in many of the areas where women have been elected in Panchayats, and have raised these issues as priorities for development at the local level. For example, Panchayats in Orissa have achieved positive development objectives in areas of sanitation, literacy, old age pension and family welfare (n.a. *Panchayati Raj Update*, 1998, p.4). Positive developmental benefits have been achieved for women and for the whole community. Since most of the rural development programmes are channeled through the Panchayati Raj institutions, women's participation in Panchayati Raj institutions has meant that women can now be participants in decision making processes relevant to their development (Vidya 1997, p.70).

Where women are prevented from participating in public life, whether the cause is institutional or not, there is an issue of the denial of justice (Rai 1997, p.269), and a denial of the right to take part in the governance of their country (Article 21, UDHR).¹⁰⁸ The 73rd Amendment to the Constitution has been a critical mechanism for women in India to be able to realise their right to take part in governing their country.

The reservations scheme has however been criticised by some, such as Dhaliwal (1995), for failing to assess whether the inclusion of women has altered structures of domination. Dhaliwal argues that providing formal rights to groups such as women and tribal/scheduled classes reaffirms the hegemonic core. The “margins are added without any significant destabilization of that core” (Dhaliwal 1995, p.44). Equating inclusion with fairness and equality, Dhaliwal argues, “misses how the other(ed) can be included to actually craft a hegemonic self” (Dhaliwal 1994, p.44). Dhaliwal's argument here is valid as it can explain some of the shortcomings of reservation

¹⁰⁸ See Appendix 2.

scheme so far witnessed (eg Dalit women Sarpanches not actually obtaining any power within Panchayats).¹⁰⁹

Dhaliwal's criticisms are supported by Rai (1997, p.266) who argues that representation in this manner can have the impact of constructing women's interests as universal and therefore negate other factors such as race, class and sexuality. Rai further notes the associated problems women representatives face in being accountable to women, while also being required to represent mixed constituencies.

These criticisms reflect many of the frustrations women have experienced with the system, which in turn reflect the frustrations generally within the women's movement, as discussed in Chapter Three. For this reason it is a mistake to see the enactment of this legislation as a signifier of women in India having achieved political equality. The legislation needs to be seen as a means to the end of political equality, not as an end in itself. It is important to recognise the potential of reservation not in terms of just political equality, but in terms of what changes can be brought about in women's every day lives (eg improved health, education, child care).

Women's participation in Panchayats is a nationwide scheme, but the benefits have not appeared nationwide. Transcending the differences between success and failure has depended upon the extent of the support provided to assist in the implementation. Education and training programs, for both men and women, have been essential support measures for the implementation of the reservations scheme. The training programs have been critical for changing male attitudes towards women, so that the women Panchayati members are recognised for themselves, rather than as appendages to their male family members. This empowers women to be able to speak for themselves, and their constituents, rather than just their husband and his family.

¹⁰⁹ Mallick (1998) criticises reservation schemes for identifying the representatives as a distinct group, yet not ensuring that the advantages extend beyond the actual representatives.

The Indian Government has run some training workshops for women, but the burden for equipping women for their role has fallen largely on the voluntary sector. India's civil society has played a leading role in training women to enable their effective participation, thereby transcending the gap between legislation and implementation. By and large the reason for this is because the Indian civil society is an active one, and that the State has relied on it to a great deal to deliver such services because India's civil society has the expertise and it can access resources through western NGOs that the State cannot.¹¹⁰ In Brahmangarh, the all-woman Panchayat has used civil society in an even more active way than simply as training providers, by working with voluntary organisations to shift the developmental priorities of their village (Mohanty 1995, p.3349).

Other non-legal factors, which are essential for the implementation of the legislation to be successful, are specific to the circumstances of India but should not be taken for granted. They include: a vibrant network of voluntary organisations in India's civil society which have the capacity to deliver training and education programs; the existence of a National Commission for Women, which was able to bring a focus on the provision of the non-legal requirements; finance for all the training schemes, and for any schemes the Panchayati Raj wished to undertake; the support of other bodies in the village to ensuring that the Panchayat's intentions are fulfilled (eg voluntary organisations, schools, religious institutions, other government bodies); and lastly, the personalities of the women who get elected and their personal situation, can in itself be a crucial factor determining to what success they are successful in influencing governance at the local level. Without the support of non-legal factors in the social economic and political lives of women, legislation such as this would not be successfully implemented.

¹¹⁰ This point is debatable because the State may have access to donor funds, but be unwilling to commit the funds to these sectors. The State does not always see women's participation as a priority, as evidenced by the lack of funds allocated by the State to such activities (Agnihotri & Mazumdar 1995).

It is necessary to create proper social, economic and also [sic] political conditions to enable women to participate effectively in the local government institutions ... (Mohanty 1995, p.3346).

Social Action Litigation (SAL)

SAL is an important case study in that it demonstrates examples of administrative and technical means for converting the law into a subversive site and adopting a rights-based approach to law and development. The law encases the social and economic situation and conditions of women, and their capacity for action and mobility. For instance, the legal framework, specifies women's work conditions and their rights to unionise. SAL is a mechanism that women can use to re-negotiate their legal identities in an effort to improve their socio-economic situation. SAL has been effectively used to protect women's rights.

The human rights movement has made the judiciary one of the most important government institutions in terms of bearing the responsibility of arbitrating between the State and the protection of individual's rights (Coomaraswamy 1987, p.1). The judiciary has been pushed by activists and public interest groups to play a greater role, when they found the legislature and executive unresponsive to their demands. In India the judiciary is attempting to meet this challenge through innovative mechanisms such as SAL.

Through SAL the Indian judiciary and legal fraternity have been able to work to ensure the principles of human rights encompassed in the Constitutional directives are upheld through the legal system in the domestic sphere. SAL has been successfully used to uphold the right to work (Article 23), right to equal protection under the law (Article 7), right to not be held in slavery or servitude (Article 4), and the right to recognition as a person before the law (Article 6).¹¹¹

¹¹¹ See Appendix 2 for UDHR references.

Even more importantly, both the judiciary and legal fraternity are addressing the common complaint of legal systems in developing countries, that the law is not an accessible tool for disadvantaged groups, particularly women. As discussed in Chapter Three, lack of access has caused some frustration among Indian women activists trying to engage in legal strategies. Access to justice is also an important component of good governance. In reference to this aspect of SAL Justice Bhagwati labeled SAL the ‘democratisation of remedies’ (referred to in Tiruchelvam & Coomaraswamy 1987, p.xi).

Central to the problem of accessibility has been the historical problem India has inherited, as a result of a colonial legal system being imposed ineffectively upon local systems and conditions. For instance, SAL is a mechanism which directly addresses the problems of *standing*, which Indian law inherited from British legal systems. The British rules of standing do not operate effectively in a country like India where the impact of it is to deny many people who are illiterate and impoverished access to the law. Thus, the Indian judiciary has explicitly stated that it is in order to meet the needs of conditions in India (eg over-burdened courts, illiterate clients, and impoverishment), that the rules of standing have been altered to allow greater access to the law.

The advent of SAL has also provided a window of opportunity for civil society to have a greater voice in India’s legal system. Radical activists were provided an entry point into the legal system which had not existed during the oppressive rule of Indira Gandhi in the 1970s.¹¹² The legal activists saw SAL as an important mechanism for being able to use the law to redefine relations between the advantaged and disadvantaged sectors of Indian society. Dhavan (1986, p.299) argues that it was this positive response by legal activists to SAL which has in fact made it so successful.

¹¹² In the 1970s the courts adopted a strong top down approach to legal development linking it strongly to litigation and top down planning.

Another advantage of SAL is that it is able to address the criticisms of the human rights discourse made by western feminists such as Carol Smart. Smart argues that rights are often formulated to deal with a social wrong, but in practice become focused on the individual who must prove that her rights have been violated. Any redress too, Smart argues, affects only that particular woman (cited in Kapur & Cossman 1996, p.288). SAL is a unique mechanism for dealing with the abuse of human rights situation, because it places the focus on the issue, rather than the individual (eg the release of undertrial prisoners in Bihar¹¹³ brought a legal focus onto an issue that was without doubt a violation of people's rights). Furthermore, SAL is able to provide redress for human rights abuses which can be extended, beyond the individual, to a defined category of people, who have all suffered in the same situation.

Under SAL, the courts' intervention in socio-political and internal administrative systems of institutions has been so far reaching it has attracted the criticism that the Supreme Court may have acted beyond its jurisdiction, and blurred the separation of powers. For instance, some critics expressed concerns when the Supreme Court ordered a State to enact certain legislation¹¹⁴ or when the Supreme Court determined how much money a mental institution should pay for food per patient per.¹¹⁵ Sorabjee responds to this by arguing that "the notorious tardiness of legislatures and the callous inertia of the executive in addressing violations of fundamental rights provide a proper occasion for judicial intervention" (Sorabjee 1993, p.37).¹¹⁶ Through

¹¹³ *Hussainara Khatoon (I and II) v Home Secretary, State of Bihar*, AIR 1979 SC 1360; 1980 1 SCC 91.

¹¹⁴ *Sheela Barse v Union of India* [1986] 3 S.C.C 596.

¹¹⁵ *Rakesh Chand Narian State of Bihar* [1986] Supp. S.C.C. 576.

¹¹⁶ Vierdag has raised similar criticisms in relation to international human rights, arguing that economic and social rights should not be characterised as human rights since to do so "would imply the competence of a court to compel the [government] to take measures [to create] conditions under which a social right can be enjoyed" (quoted in Alston 1988, pp.34-35). Vierdag finds this unacceptable because he perceives judicial involvement in ordering such measures (for example in the SAL cases) would require judges to deal with "utterly political questions" which in turn would "nullify the separation of powers" and would turn the judiciary into a "political organ". Alston counters this by saying: "The very essence of the concept of a right in that context is to limit governmental discretion and to ensure that, absent some clearly articulated overriding justification, certain priorities must be taken as having been established by law" (Alston 1998, pp.34-35).

SAL, if the Court is notified of a gross violation of a human right, it has the means, within the parameters of the constitution, to respond.

Another major criticism has been that SAL cases have placed additional burdens on an already overburdened court system. This criticism is particularly important because as the courts move to more investigative roles under SAL, this has the potential to create further delays in the court system because the courts are not sufficiently resourced to perform such investigative roles. Although SAL claims assist in dealing with large numbers of people within one case, it has also led to an increase in the number of cases being presented.¹¹⁷ Already we are seeing the courts overburdened with SAL claims.

SAL does not overcome the fact that most courts are at breaking point and do not have the resources to attend to the number of petitions being submitted. Similarly, the public interest orders are directed at State authorities whose resources, competence and commitment have also remain unchanged. Instead of forcing government to make good on its legal promises to the poor, the courts issue unenforceable judgments and risk becoming partners in the “mass production of rights and entitlements that they cannot easy fulfill” (Galanter 1989, p.281). Cassels (1991, pp.134-135) gives the example of the Union Carbide Case in Bhopal of an instance where there is disillusionment setting in because as of 1991, six years after the event, the plight of the victims had not improved. For these reasons Varma (1985, p.103) argues that SAL, should be developed as a last resort for people, after other non-litigious possibilities have been canvassed.

Craig and Deshpande (1989) respond to the criticism that SAL has become too loose in its restrictions on standing. That is, it is not restrictive enough and therefore can be applied to a breadth of situations, including examples such as harijan workers who are living in poverty and destitution. However, Craig and Deshpande (1989) point

¹¹⁷ There are also questions about the future of SAL. For instance, will the advances that have been made under SAL be retainable under the new WTO rules, where most litigation is likely to take place under international arbitration? These are important issues on which further research could be done.

out that Bhagwati CJ, has countered this criticism by arguing that a breadth of vision is necessary because, otherwise, to narrowly limit access to the courts is to effectively reduce the promise of judicial review to but a “teasing illusion” (cited in Craig & Deshpande 1989, p.361).

Cassels (1991), who canvases some of the other criticisms of the SAL developments, argues that, although SAL has produced a radical transformation in legal rhetoric, exposed oppressive social conditions, and improved the material conditions of life for some individuals, these achievements are largely symbolic and isolated.¹¹⁸

It is also debatable whether the SAL example is extendable to other developing countries or not. The requirements for the development of SAL have included an educated and informed judiciary, committed to social justice. Furthermore, it has required a judiciary that is distinct and independent of the State and that does not fear reprisal from the State. The State must allow the judiciary to direct it on various matters (eg providing adequate health care in government medical institutions). Other non-legal factors which have made SAL so successful include: the existence of volunteer organisations who have the legal capacity to undertake legal activism; an active legal fraternity who are willing to take on SAL cases; a strong and active judiciary willing to make the law accessible to the disadvantaged; a government who allows such a strong judiciary and civil society to work together, especially in opposition to the State. These necessary elements may not exist in other developing countries.

In all the recent literature on the development and impact of SAL, there has been very little describing the impact of SAL on women in India. This is a revealing oversight since, of all the groups in India, women living in absolute poverty are the

¹¹⁸ Galanter (1989, p.291) criticises SAL for being atomistic and limited to reacting to individual's client's issues on a case by case basis, with no strategic representation. Galanter advocates for legal practitioners to adopt a more strategic approach, what Galanter terms the “repeat player” strategy, where a particular issue is targeted for a series of test cases, until a sustainable position is established. This issue has also taken up by Dhavan (1986, pp.281-309).

least able to access legal institutions due to the social and economic restrictions placed on them and the systemic oppression they experience.

Through SAL, some of these gendered issues of access to the law have been addressed to a limited extent. With the advent of SAL, legal activists have been able to take their women clients' cases to Court, on their behalf, without the client even having to attend, thereby protecting them from any social stigma which may attach to them being present in the Courts. Similarly, many women who may not have the economic means, or simply the time to make a claim, can be represented in court under a SAL action. The collective nature of SAL also enables groups of women to lay claims, where any individual woman may have found it impossible to do it on her own.

Despite these advantages SAL may have for women, how many of the issues taken up in SAL actually address women's needs specifically? Not many. One criticism of women and the law in India, by A R Desai, is relevant here. Desai criticises the relegation of women's issues such as matrimony, maintenance, guardianship etc being relegated to the sphere of 'personal law'. Desai (1994, p.49) argues for women's issues to be brought more directly into the public sphere of the State. Bringing women's issues into the public sphere is also essential to ensuring the accountability of the State to women citizens. For example the directives in Part IV of the Constitution, combined with the anti-sex discrimination clauses in the Constitution, could allow for greater examination of women's issues under SAL.¹¹⁹

Unfortunately as argued by Cossmand and Kapur (1993, p.299), the Court is only open to addressing the abuse of fundamental rights, which relate mainly to an abuse of rights in the public sphere. These criticisms of the human rights discourse, for

¹¹⁹ In another example, R V Kelkar argues that under the Directive Principle of State policy, contained in Article 46 of the Constitution (see Appendix 3), the State is under a duty to protect tribal people from social injustice and exploitation and the State is under a duty to apply the Directive Principles in any laws it makes. Therefore the State should be able to amend section 125 of the Criminal Procedure Code to make adequate provision for the maintenance of tribal wives who are married under tribal customs (Kelkar 1994, p.191).

retaining a private / public dichotomy that prevents it from redressing violations of women's human rights that occur in the private sphere, were discussed in Chapter Three.¹²⁰ Cossman and Kapur (1995, p.289) conclude that in order to achieve social change, legal strategies need to be located within a broader political struggle that directly involves those most affected.

Future Developments

Although Otto (1997) bases her discussion of *transformative dialogue* in the human rights movements, her notions of transformative dialogues are useful for describing the transformative practices in law and development discussed in this thesis. Otto argues that “transformative dialogue must rebuild ... movements from the ground up in order to anchor them in an ethical commitment to global, social and economic justice ... The productive tensions between local and global knowledges are useful in this endeavour” (1997, p.39). The case studies are examples of movements that have been built from the ground, and that demonstrated the effective use of legal strategies to achieve social and economic justice. Furthermore, the global knowledges of the rights-based approach, and the theoretical knowledges of Kapur and Cossman's law as a subversive site, are informed by this illustration of how these knowledges can work in practice.

It is fundamental that legal strategies such as SAL, and others illustrated in the case studies, continue to be promoted and utilised in legal development projects. Local examples from the grass roots, show an alternative vision of law and development which takes on the rights-based approach and the challenges of a feminist perspective of law and development. The concepts of civil society, good governance and international human rights are important components of the rights-based approach, and as the case studies show, can be accommodated in practical circumstances. Importantly these case studies demonstrate that the law is an important framework

¹²⁰ Cossman and Kapur also point out that in order to restrict the numbers of SAL cases, the Courts are now only using SAL to redress ‘gross violations of fundamental rights’, thus reducing the possibilities for women to use SAL as an effective tool (Cossman & Kapur 1993, p.299).

within which a rights-based approach to law and development can be negotiated and established to ensure the positive change for many women in India.

The law envisioned in another alternative kind of development is a law which grows out of popular struggles to regain control of resources and power, law which responds to human needs, tangible and intangible and law which grows out of new social structures (Paul & Dias 1992, p.378).

CONCLUSION

This study of law and development has focused on how the current dominating *economic approach* in this field can be broadened to include women's issues, and issues of human rights, democracy, civil society and good governance more effectively, by adopting a *rights-based approach* that is informed by a feminist analysis.

Economic globalisation is an important factor in the context for law and development in the 1990s, as outlined in Chapter One. The extent to which this factor is currently dominating the field of law and development can be seen in Guest's (1997) comment of the NGO Forum at the Fourth World Conference for Women in Beijing:

What I heard passionately repeated like a mantra from many feminists of the South and a few from the North was that the critical issues which active feminists must urgently address were the increasing globalisation of the economy, the unbridled power of trans-national corporations (TNCs) and the recolonising effects of international institutions and agreements such as the World Bank, the International Monetary Fund (IMF) and most particularly, the Uruguay round of the general Agreement on Trade and Tariffs (GATT). Only within this global economic web could other conference themes (governance, peace, human rights, and personal violence) be meaningfully mapped (Guest 1997, p.77).

Chapter One outlined the negative impacts of economic globalisation, including the interests of citizens in developing countries being sacrificed for the interests of creditor States, TNCs and multilateral organisations such as the World Bank and IMF. This is especially important in the instance of marginalised women, for whom there are limited opportunities within the current economic globalisation agenda.

Under what I have termed the *economic approach* to law and development, legislation and regulation are key tools being used to by the international players to further the economic globalisation agenda, both internationally and nationally, resulting in substantial commercial legal reforms in developing countries, including India. In Chapter Two the economic approach to law and development was contrasted with the

rights-based approach. It has been argued that the rights-based approach can establish a space in law and development that incorporates issues of human rights, democracy, civil society, good governance, and the needs and issues of women, which are being marginalised under globalisation.

Chapter Three outlined how the women's movement in India has extensively utilised legal reform to improve the social, economic and political status of women, and some of the causes for frustration that lay in that avenue. In contrast to those who argue that the law is a patriarchal system, which can not deliver justice for women, this thesis has advocated that theoretical approaches such as Kapur and Cossman's be adopted. Kapur and Cossman grasp the potential of law by viewing it as a *subversive site* – a site within which women can engage and negotiate for the recognition of their legal rights, and thereby overcome some of the barriers to their social, economic and political advancement.

The historical context, both in the areas of the field of law and development, and in the use of legal strategies in the Indian women's movement, provided a point of comparison for analysing the current use of legal strategies in both areas. Thus in Chapter One, the critiques of the earlier approaches to law and development provided an insight and appreciation into the criticisms of the approaches being taken in law and development today. Similarly, in Chapter Three the current use of legal strategies by women in India was located in the context of the earlier histories of colonialist and nationalist interaction. This historical context highlighted some of the frustrations experienced by women activists in India as a result of their engagements with the law.

The innovative elements brought to this thesis lie in the inter-disciplinary approach adopted, by bringing together the fields of law and development (Chapter One / Two) with women and law in India (Chapter Three). This thesis has related the field of law and development with the fields of women and development, women and the law, human rights, democracy, good governance and civil society. In so doing, it has been demonstrated that the current narrow economic approach that dominates law and

development can be expanded with a broader rights-based approach. At the same time, current women's legal theory and activism has been situated within a wider international framework which is vital given the impact of globalisation on women in contemporary times.

Chapter Four illustrated three case studies from India: unionisation in the informal sector; reservations for women in the Panchayati Raj; and social action litigation. These case studies, although not new to India, in this thesis, they have been analysed from the distinctive perspective of seeing them as examples of the field of law and development.

Chapter Five demonstrated how the case studies drew together the fields of women and law and development. The case studies have been used to ground the theoretical approaches of Chapters Two and Three in existing practices in India. The case studies were used to critically argue that legal interventions can be made for the purpose of enabling marginalised women to achieve developmental objectives such as access to a minimum wage, health services, education, participation in governance and access to legal services. The case studies demonstrated the advantages of a rights-based approach to law and development and the advantages of viewing the law as a subversive site, in terms of enabling women to participate in and benefit from the development process. Importantly the case studies also showed that the law can be more effective as a tool for social change when understood as a *dependent variable*, that relies on, and works in conjunction with, other non-legal factors.

In conclusion, this thesis has shown that the current demands of economic globalisation are pushing the development of legal systems in developing countries in a direction that does not address women's needs. The argument that has been made is that the field of law and development needs to broaden its approach, along the lines of the right-based approach, so that issues of democracy, civil society and good governance are appropriately incorporated, and essentially so that women's needs and issues are also addressed. The thesis has also demonstrated that adopting a rights-based approach is

important if the field of law and development is to avoid the criticisms which led to the self-estrangement in the 1970s.

India has been used as a context in which to demonstrate the advantages of a rights-based approach to law and development. In this way, the rights-based approach to law and development has been informed by local theories and practices from India. Theoretically the focus has been on Kapur and Cossman's theory of reconstructing the law as a subversive site. In practice, the three case studies demonstrated how women in India were approaching the law as a subversive site, how they were applying a rights-based approach to law and development, and how they were obtaining developmental benefits (eg food health water, justice, equality, etc) from their engagements with the law. As the title of the thesis claims, these are the transformative practices that women in India are undertaking in the field of law and development to demand their rights, to have their identities recognised in all spheres of society, to stand up and be counted, and to make their lives meaningful.

APPENDIX 1

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS RATIFIED BY INDIA¹²¹

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	STATUS*
Universal Declaration of Human Rights	X
International Covenant on Economic Social and Cultural Rights	X
International Covenant on Civil and Political Rights	X
Optional Protocol to the ICCPR	—
Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty	—
International Convention on the Elimination of All Forms of Racial Discrimination	X
International Convention on the Suppression and Punishment of the Crime of Apartheid	X
International Convention Against Apartheid in Sports	X
Convention on the Prevention and Punishment of the Crime of Genocide	X
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	X
Convention on the Rights of the Child	X
Convention on the Elimination of All Forms of Discrimination Against Women	X
Convention on the Political Rights of Women	X
Convention on the Nationality of Married Women	S

¹²¹ Source: *Human Rights International Instruments: Chart of Ratifications as at 31 December 1995*, United Nations, Geneva, 1995.

HUMAN RIGHTS INSTRUMENTS	STATUS*
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	—
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	—
Slavery Convention of 1926	X
1953 Protocol amending the 1926 Convention	X
Slavery Convention of 1926 as amended	X
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery	X
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	X
Convention on the Reduction of Statelessness	—
Convention Relating to the Status of Stateless Persons	—
Convention Relating to the Status of Refugees	—
Protocol Relating to the Status of Refugees	—
Convention on the Rights of Migrant Workers and the Members of their Families	—

* The symbol X means ratification, accession, approval, motivation, acceptance or definition signature. The symbol S means signature not yet followed by ratification.

APPENDIX 2**THE UNIVERSAL DECLARATION OF HUMAN RIGHTS¹²²**

(Adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December 1948)

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore, *THE GENERAL ASSEMBLY* proclaims

this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

¹²² Text taken from *A Compilation of International Instruments*, Centre for Human Rights, Sydney, 1993.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to a law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has a right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has a right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. everyone, without any discrimination has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has his duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform an act aimed at the destruction of any of the rights and freedoms set forth herein.

APPENDIX 3

THE CONSTITUTION OF INDIA - EXCERPTS¹²³

Part III Fundamental Rights

14. Equality before law. – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. – (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

(a) access to shops, public restaurants, hotels and places of entertainment

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

16. Equality of opportunity in matters of public employment. – (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

17. Abolition of Untouchability. – “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

19. Protection of certain rights regarding freedom of speech etc. - (1) All citizens shall have the right –

(a) to freedom of speech and expression;

(b) to assemble peaceably without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory; and

(g) to practise any profession, or to carry on any occupation, trade or business.

20. Protection in respect of conviction for offences. – (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater

¹²³ Text taken from *The Constitution of India: With Short Notes and Subject Index*, Eastern Book Company, Lucknow, 1996.

than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) no person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

21. Protection of life and personal liberty. – No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases. – (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of arrest nor shall be denied the right to consult, and to be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

23. Prohibition of traffic of human beings and forced labour. – (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.

24. Prohibition of employment of children in factories etc. – No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any hazardous employment.

25. Freedom of conscience and free profession, practice and propagation of religion. – (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

26. Freedom to manage religious affairs. – Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

29. Protection of interests of minorities. – (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. Rights of minorities to establish and administer educational institutions. –

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

31C. Saving of laws giving effect to certain directive principles. –

Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19, and no law containing a declaration that it is for giving effect to such policy has been called into question in any court on the ground that it does not give effect to such policy.¹²⁴

Part IV Directive Principles of State Policy

37. Application of the principles contained in this Part. – The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

39. Certain principles of policy to be followed by the State. – The State shall, in particular, direct its policy towards securing –

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a health manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.¹²⁵

39A. Equal Justice and Free Legal Aid. – The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.¹²⁶

¹²⁴ Addition made under *Constitution (Forty-second) Amendment Act 1976*, S.4., and amended under *Constitution (Forty-fourth) Amendment Act 1978*, S.8

¹²⁵ Article 39(f) inserted under *Constitution (Forty-second) Amendment Act 1976*, S.7.

¹²⁶ Article 39A inserted under *Constitution (Forty-second) Amendment Act 1976*, S.8.

40. Organisation of village panchayats. – The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

41. Right to work, to education and to public assistance in certain cases. – The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

42. Provision for just and humane conditions of work and maternity relief. – The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. Living wage, etc., for workers. – The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

43A. Participation of workers in management of industries. – The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.¹²⁷

44. Uniform civil code for the citizens. – The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

45. Provision for free and compulsory education for children. – The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. – The State shall promote with special care the educational and economic interests of the weaker sections of people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health. – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring

¹²⁷ Article 43A inserted under *Constitution (Forty-second) Amendment Act 1976*, S.9.

about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48. Organisation of agriculture and animal husbandry. – The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

48A. Protection and improvement of environment and safeguarding of forests and wildlife. – The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.¹²⁸

51. Promotion of international peace and security. – The State shall endeavour to

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

Part IVA Fundamental Duties¹²⁹

51A. Fundamental Duties. – It shall be the duty of every citizen of India –

- (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the national Anthem;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher level of endeavour and achievement.

¹²⁸ Article 48A inserted under *Constitution (Forty-second) Amendment Act 1976*, S.10.

¹²⁹ Part IV A inserted under *Constitution (Forty-second) Amendment Act 1976*, S.11.

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> DECLARATION OF HUMAN RIGHTS FROM A GENDER PERSPECTIVE

>

> CONTRIBUTIONS TO THE 50th. ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN

> RIGHTS

>

> CLADEM

>

> INTRODUCTION

>

> The Universal Declaration of Human Rights, signed after
> World War II, in 1948, meant the beginning of an era of
> commitments on the part of the States to respect the
> rights of the citizens and display all the necessary
> efforts to guarantee peace all over the world.

>

> The knowledge of the human rights contained in said
> Declaration is a basic requisite to be able to exercise
> one's citizenship. He/she who does not know his/her
> rights cannot demand that they be complied with.

>

> After 50 years of these norms being enforced, us women
> deem it necessary to create a new instrument which will
> make us visible as subjects and furthermore, that it
> incorporate the advances achieved in the area of human
> rights during this period, specially from a gender and
> ethnic perspective.

>

> The Latin American and Caribbean Committee for the
> Defense of Women's Rights (CLADEM) is a gathering of
> persons and institutions that work for the promotion and
> defense of women's rights in 17 countries of the region.

>

> CLADEM has, among its priorities, the defense and
> diffusion, in a broad and inclusive manner, that is,
> without making persons invisible on account of their sex,
> ethnic, race, age, social or economic origin, creed or
> any other reasons.

>

> In view of this objective, and considering the
> initiatives presented worldwide to celebrate the 50th
> Anniversary of the Universal Declaration, CLADEM is
> boosting a campaign to incorporate the gender perspective
> in the human rights discourse.

>

> The brochure which we are now presenting is a part of
> this campaign and contains 4 documents :

>

> * The Universal Declaration of Human Rights, signed by the
> United Nations in 1948.

>

> * The proposal of "Universal Declaration of Human Rights
> from a Gender Perspective". The campaign for its approval
> in the United Nations is being boosted by CLADEM and other
> women's organizations of the region, so that it can be
> approved by the United Nations General Assembly in its 53rd

- > Session in December 1998, on the 50th Anniversary of the
- > Declaration.
- >
- > * Support sheets to CLADEM's proposal so that persons can
- > back us up and participate in the campaign by signing same.
- >
- > * Sample letter of support so that the institutions that
- > coincide with what is being proposed in the Declaration can
- > copy it in their own letterhead and send it duly signed to
- > CLADEM's Regional Offices.
- >
- > We invite whoever reads it, to spread the Universal
- > Declaration of Human Rights and to support CLADEM's
- > campaign, so that the new Declaration can be approved by
- > the United Nations and thus help to strengthen and enrich
- > the previous one. Please send the signed support sheets
- > and the sample support letters to :
- >
- > CLADEM
- > P.O. Box 11-0471
- > email:cladem#chavin.rcp.net.pe
- > Lima
- > Peru

- >
- > Whereas a common understanding of these rights and freedoms
- > is of the greatest importance for the full realization of
- > this pledge,
- >
- > Now, therefore,
- >
- > The General Assembly,
- >
- > Proclaims this Universal Declaration of Human Rights as a
- > common standard of achievement for all peoples and all
- > nations, to the end that every individual and every organ of
- > society, keeping this Declaration constantly in mind, shall
- > strive by teaching and education to promote respect for
- > these rights and freedoms and by progressive measures,
- > national and international, to secure their universal and
- > effective recognition and observance, both among the peoples
- > of Member States themselves and among the peoples of
- > territories under their jurisdiction.
- >
- > Article 1.-
- >
- > All human beings are born free and equal in dignity and
- > rights. They are endowed with reason and conscience and
- > should act towards one another in a spirit of brotherhood.
- >
- > Article 2.-
- >
- > Everyone is entitled to all the rights and freedoms set
- > forth in this Declaration, without distinction of any kind,
- > such as race, color, sex, language, religion, political or
- > other opinion, national or social origin, property, birth or
- > other status.
- >
- > Furthermore, no distinction shall be made on the basis of
- > the political, jurisdictional or international status of the
- > country or territory to which a person belongs, whether it
- > be independent, trust, non-self-governing or under any other
- > limitation of sovereignty.
- >
- > Article 3.-
- >
- > Everyone has the right to life, liberty and security of
- > person.
- >
- > Article 4.-
- >
- > No one shall be held in slavery or servitude; slavery and
- > the slave trade shall be prohibited in all their forms.
- >
- > Article 5.-
- >
- > No one shall be subjected to torture or to cruel, inhuman or
- > degrading treatment or punishment.
- >
- > Article 6.-
- >
- > Everyone has the right to recognition everywhere as a person

> before the law.

>

>

> Article 7.-

>

> All are equal before the law and are entitled without any
> discrimination to equal protection of the law. All are
> entitled to equal protection against any discrimination in
> violation of this Declaration and against any incitement to
> such discrimination.

>

> Article 8.-

>

> Everyone has the right to an effective remedy by the
> competent national tribunals for acts violating the
> fundamental rights granted him by the constitution or by
> law.

>

> Article 9.-

>

> No one shall be subjected to arbitrary arrest, detention or
> exile.

>

> Article 10.-

>

> Everyone is entitled in full equality to a fair and public
> hearing by an independent and impartial tribunal, in the
> determination of his rights and obligations and of any
> criminal charge against him.

>

> Article 11.-

>

> 1. Everyone charged with a penal offence has the right to be
> presumed innocent until proved guilty according to law in a
> public trial at which he has had all the guarantees
> necessary for his defense.

>

> 2. No one shall be held guilty of any penal offence on
> account of any act of omission which did not constitute a
> penal offence, under national or international law, at the
> time when it was committed. Nor shall a heavier penalty be
> imposed than the one that was applicable at the time the
> penal offence was committed.

>

> Article 12.-

>

> No one shall be subjected to arbitrary interference with his
> privacy, family, home or correspondence, nor to attacks upon
> his honor and reputation. Everyone has the right to the
> protection of the law against such interference or attacks.

>

> Article 13.-

>

> 1. Everyone has the right to freedom of movement and
> residence within the borders of each State

>

> 2. Everyone has the right to leave any country, including
> his own, and to return to his country.

>
> Article 14.-

- >
> 1. Everyone has the right to seek and to enjoy in other
> countries asylum from persecution.
>
> 2. This right may not be invoked in the case of prosecutions
> genuinely arising from non-political crimes or from acts
> contrary to the purposes and principles of the United
> Nations.

>
> Article 15.-

- >
> 1. Everyone has the right to a nationality.
>
> 2. No one shall be arbitrarily deprived of his nationality
> nor denied the right to change his nationality.

>
> Article 16.-

- >
> 1. Men and women of full age, without any limitation due to
> race, nationality or religion, have the right to marry and
> to found a family. They are entitled to equal rights as to
> marriage, during marriage and at its dissolution.
>
> 2. Marriage shall be entered into only with the free and
> full consent of the intending spouses.
>
> 3. The family is the natural and fundamental group unit of
> society and is entitled to protection by society and the
> State.

>
> Article 17.-

- >
> 1. Everyone has the right to own property alone as well as
> in association with others.
>
> 2. No one shall be arbitrarily deprived of his property.

>
> Article 18.-

- >
> Everyone has the right to freedom of thought, conscience and
> religion; this right includes freedom to change his religion
> or belief, and freedom, either alone or in community with
> others and in public or private, to manifest his religion or
> belief in teaching, practice, worship and observance.

>
> Article 19.-

- >
> Everyone has the right to freedom of opinion and expression;
> this right includes freedom to hold opinions without
> interference and to seek, receive and impart information and
> ideas through any media and regardless of frontiers.

>
> Article 20.-

- >
> 1. Everyone has the right to freedom of peaceful assembly
> and association.

- >
- > 2. No one may be compelled to belong to an association.
- >
- > Article 21.-
- >
- > 1. Everyone has the right to take part in the government of
- > his country, directly or through freely chosen
- > representatives.
- >
- > 2. Everyone has the right to equal access to public service
- > in his country.
- >
- > 3. The will of the people shall be the basis of the
- > authority of government; this will shall be expressed in
- > periodic and genuine elections which shall be by universal
- > and equal suffrage and shall be held by secret vote or by
- > equivalent free voting procedures.
- >
- > Article 22.-
- >
- > Everyone, as a member of society, has the right to social
- > security and is entitled to realization, through national
- > effort and international co-operation and in accordance with
- > the organization and resources of each State, of the
- > economic, social and cultural rights indispensable for his
- > dignity and the free development of his personality.
- >
- > Article 23.-
- >
- > 1. Everyone has the right to work, to free choice of
- > employment, to just and favorable conditions of work and to
- > protection against unemployment.
- >
- > 2. Everyone, without any discrimination, has the right to
- > equal pay for equal work.
- >
- > 3. Everyone who works has the right to just and favorable
- > remuneration ensuring for himself and his family an
- > existence worthy of human dignity, and supplemented, if
- > necessary, by other means of social protection.
- >
- > 4. Everyone has the right to form and to join trade unions
- > for the protection of his interests.
- >
- > Article 24.-
- >
- > Everyone has the right to rest and leisure, including
- > reasonable limitation of working hours and periodic holidays
- > with pay.
- >
- > Article 25.-
- >
- > 1. Everyone has the right to a standard of living adequate
- > for the health and well-being of himself and of his family,
- > including food, clothing, housing and medical care and
- > necessary social services, and the right to security in the
- > event of unemployment, sickness, disability, widowhood, old
- > age or other lack of livelihood in circumstances beyond his

- > control.
- >
- > 2. Motherhood and childhood are entitled to special care and
- > assistance. All children, whether born in or out of wedlock,
- > shall enjoy the same social protection.

> Article 26.-

- >
- > 1. Everyone has the right to education. Education shall be
- > free, at least in the elementary and fundamental stages.
- > Elementary education shall be compulsory. Technical and
- > professional education shall be made generally available and
- > higher education shall be equally accessible to all on the
- > basis of merit.

- >
- > 2. Education shall be directed to the full development of
- > the human personality and to the strengthening of respect
- > for human rights and fundamental freedoms. It shall promote
- > understanding, tolerance and friendship among all nations,
- > racial or religious groups, and shall further the activities
- > of the United Nations for the maintenance of peace.

- >
- > 3. Parents have a prior right to choose the kind of
- > education that shall be given to their children.

> Article 27.-

- >
- > 1. Everyone has the right freely to participate in the
- > cultural life of the community, to enjoy the arts and to
- > share in scientific advancement and its benefits.

- >
- > 2. Everyone has the right to the protection of the moral and
- > material interests resulting from any scientific, literary
- > or artistic production of which he is the author.

> Article 28.-

- >
- > Everyone is entitled to a social and international order in
- > which the rights and freedoms set forth in this Declaration
- > can be fully realized.

> Article 29.-

- >
- > 1. Everyone has duties to the community in which alone the
- > free and full development of his personality is possible.

- >
- > 2. In the exercise of his rights and freedoms, everyone
- > shall be subject only to such limitations as are determined
- > by law solely for the purpose of securing due recognition
- > and respect for the rights and freedoms of others and of
- > meeting the just requirements of morality, public order and
- > the general welfare in a democratic society.

- >
- > 3. These rights and freedoms may in no case be exercised
- > contrary to the purposes and principles of the United
- > Nations.

> Article 30.-

> DECLARATION OF HUMAN RIGHTS FROM A GENDER PERSPECTIVE

>

> CONTRIBUTION TO THE 50th. ANNIVERSARY OF THE UNIVERSAL

> DECLARATION OF HUMAN RIGHTS

>

>

> DOCUMENT N° E/CN.4/1998/NGO/3 COMMISSION ON HUMAN RIGHTS OF

> THE UNITED NATIONS - GENEVE (with revisions)

>

> INTRODUCTION

>

> In December 1998, the United Nations will commemorate the

> 50th Anniversary of the Universal Declaration of Human

> Rights. Knowing the great significance of this event, CLADEM

> (The Latin American and Caribbean Committee for the Defense

> of Women's Rights), along with other regional and

> international organizations, has developed a proposal aimed

> for adoption by the Member States of the United Nations.

>

> The year 1998 is the occasion for States to renew their

> commitment to human rights and to incorporate perspectives

> regarding gender and ethnicity that have gained prominence

> since the adoption of the Universal Declaration fifty years

> ago.

>

> In the same way that the 1948 Declaration has constituted an

> ethical code for the second half of the Twentieth Century,

> we consider it necessary today, on the threshold of the new

> millennium, that States approve another document aimed at

> the international protection of human rights, in order

> integrate advances in human rights thinking and experience

> since 1948, without invalidating in any way the achievements

> of the Universal Declaration.

>

> PREAMBLE

>

> CONSIDERING that the contemporary formulation of human

> rights emerged within a historical context in which the

> concept of the human being was by and large limited to that

> of a male, Western, white, adult, heterosexual and owner of

> assets.

>

> CONCERNED that because of this limited conception of the

> human being, the rights of women, indigenous people,

> homosexuals and lesbians, children, the elderly, disabled

> people and other groups have been restricted.

>

> CONVINCED that a holistic and inclusive concept of humanity

> is necessary for the full realization of human rights,

>

> REAFFIRMING the indivisibility, universality and

> interdependence of human rights,

- >
- > BELIEVING that, in the present context of mounting poverty,
- > inequality and violence, it is crucial to strengthen and
- > guarantee the full validity and interconnectedness of
- > environmental, reproductive, economic, social and cultural
- > rights.
- >
- > STRESSING that the following Declaration in no way reduces
- > the validity of the Universal Declaration of Human Rights,
- > nor of any other international human rights instrument, and
- > that it does not authorize activities contrary to the
- > sovereignty, territorial integrity or political independence
- > of States.
- >
- > WE THEREFORE SUBMIT TO THE GENERAL ASSEMBLY AT ITS 53RD
- > SESSION the present draft declaration for its consideration
- > in the elaboration of a Declaration for the 21st Century.
- >
- >
- > I. RIGHTS OF IDENTITY AND CITIZENSHIP
- >
- > Article 1
- >
- > 1. All women and men are born free and equal in dignity and
- > rights.
- >
- > 2. Every individual has the to enjoy all human rights, with
- > no distinction based on race, ethnicity, age, sex, sexual
- > orientation, physical or mental disability, language,
- > religion, political opinion, national or social origin,
- > economic position, birth or any other condition.
- >
- > Article 2
- >
- > 1. All human beings have the right to their own identity as
- > individuals, as members of groups with which they identify,
- > as members of a nation and as citizens of the world, with
- > the degree of autonomy and self-determination in all these
- > spheres necessary to preserve their dignity and sense of
- > self-worth. This right to identity shall not be negatively
- > affected by marriage.
- >
- > 2. Slavery, servitude, and the traffic of women, girls and
- > boys in any form, including those which take place within
- > family relationships, are prohibited.
- >
- > Article 3
- >
- > 1. All human beings have the right to an equal and equitable
- > participation in labor, political and social organizations,
- > as well as access to elective and non-elective public posts.
- >
- > 2. All States shall eliminate obstacles to the full and
- > equal enjoyment of citizenship rights by women. In
- > particular, women shall be able to acquire citizenship
- > without discrimination and to exercises the same rights as
- > men to participate in all spheres of public and political
- > life of the nation.

- >
- > Article 4
- >
- > 1. All human beings have the right to express ethnic-racial
- > diversity free from prejudices based on cultural,
- > linguistic, geographic, religious and racial discrimination.
- >
- > 2. All human beings have the right to protection against
- > ethnocide and genocide.
- >
- > Article 5
- >
- > 1. Indigenous Peoples have the right to autonomy and self
- > determination and to the maintenance of their traditional
- > political, legal, educational, social and economic
- > structures and ways of life.
- >
- > 2. Indigenous Peoples have the right to the maintenance of
- > commercial and cultural relations and communications across
- > national borders.
- >
- > 3. Indigenous Peoples have the individual and collective
- > right to participate in the decision-making process of their
- > local and national governments.
- >
- > Article 6
- >
- > People belonging to ethnic, racial, religious or linguistic
- > minorities have a right to establish their own associations,
- > to practice their own religion and use their own language.
- >
- >
- > II. THE RIGHT TO PEACE AND TO A VIOLENCE-FREE LIFE.
- >
- > Article 7
- >
- > All persons have the right to a violence-free life and the
- > enjoyment of peace in both the public and private spheres.
- > No one shall be submitted to torture or to cruel, inhumane
- > or degrading treatment or punishment. All forms of violence
- > against women constitute a violation of their human rights.
- > Violence shall not be used to deny people their right to
- > housing, in particular through forced evictions.
- >
- > Article 8
- >
- > 1. Migrants, displaced persons or refugees, and persons
- > disadvantaged because of gender, race, class, ethnic origin,
- > age, convictions or any other condition, have the right to
- > specific protection measures against violence.
- >
- > 2. All human beings have the right to live free from armed
- > conflict
- >
- > 3. Acts of a particularly egregious character perpetrated
- > against women and children in situations of armed conflict,
- > including murder, rape, sexual slavery and forced
- > pregnancies constitute crimes against humanity.

- >
- >
- > Article 9
- >
- > 1. Every citizen has the right to a national budget aimed at
- > sustainable human development and the promotion of peace by
- > their governments, including measures towards the reduction
- > of military expenditure, the elimination of all weapons of
- > mass destruction, the reduction of armaments to the strict
- > needs of national security, and the reassignment of these
- > funds towards development.

- >
- > 2. Women and representatives of disadvantaged groups have
- > the right to participate in the process of decision making
- > in the field of national security and in conflict
- > resolution.

> III. SEXUAL AND REPRODUCTIVE RIGHTS.

> Article 10

- >
- > All human beings have the right to autonomy and
- > self-determination in the exercise of their sexuality, which
- > includes the right to physical, sexual and emotional
- > pleasure, the right to freedom in sexual orientation, the
- > right to information and education on sexuality and the
- > right to sexual and reproductive health care for the
- > maintenance of physical, mental and social well-being.

> Article 11

- >
- > 1. Women and men have the right to decide on their
- > reproductive life in a free and informed manner and to
- > exercise the voluntary and safe control of their fertility,
- > free from discrimination, coercion or violence, as well as
- > the right to enjoy the highest levels of sexual and
- > reproductive health.

- >
- > 2. Women have the right to reproductive autonomy which
- > includes access to safe and legal abortions.

> IV. RIGHT TO DEVELOPMENT

> Article 12

- >
- > 1. All human beings have the right to enjoy the benefits of
- > sustainable human development, in accordance the Declaration
- > on the Right to Development.

- >
- > 2. Decisions regarding national priorities and allocation of
- > resources shall reflect the nation's commitment to the full
- > realization of economic, social and cultural rights,
- > including physical and mental health, education, freedom
- > from poverty, adequate housing, food security, equal and
- > equitable access to land, credit, technology, clean running
- > water and energy.

> Article 13

- >
- >
- > Every woman and man has the right and responsibility to
- > raise and educate their children, to carry out housework and
- > to provide for the needs of the family, including after
- > separation or divorce.
- >
- > Article 14
- >
- > 1. Everyone has the right to gainful employment; the free
- > choice of work; protection against unemployment; safe,
- > equitable and satisfactory working conditions and an
- > adequate standard of living.
- >
- > 2. Everyone has a right to enjoy the same opportunities and
- > treatment in relation to: access to services of vocational
- > training and employment; job security; remuneration for work
- > of equal value, social security, and other social benefits,
- > including rest and leisure.
- >
- > V. ENVIRONMENTAL RIGHTS.
- >
- > Article 15
- >
- > Transgenerational responsibility, gender equality,
- > solidarity, peace, respect for human rights and cooperation
- > among States are the basis for the achievement of
- > sustainable development and the conservation of the
- > environment.
- >
- > Article 16
- >
- > 1. All women and men have the right to a sustainable
- > environment and level of development adequate for their
- > well-being and dignity.
- >
- > 2. All women and men have the right to access technologies
- > sensitive to biological diversity, essential ecological
- > processes and life conservation systems in industry,
- > agriculture, fishing and pasturing.
- >
- > Article 17
- >
- > 1. All persons have the right to participate actively in
- > local, national and international environmental management
- > and education.
- >
- > 2. The environmental policies shall aim to:
- >
- > a) Provide consumers with suitable information,
- > comprehensible to persons of all ages, linguistic origins,
- > and degrees of literacy. b) Promote the elimination of
- > chemical products and pesticides which are toxic and
- > dangerous for the environment, reducing health risks that
- > affect people both at home and at work, in urban and rural
- > areas. c) Foster the manufacturing of products that are
- > sensitive to and respectful of the environment and that
- > apply non-polluting technologies..d) Support the recovery of
- > eroded and deforested lands, of harmed hydrographic basins
- > and of polluted water supply systems.

Thirty-one lakh cases pending in various courts

A whopping 31 lakh cases are pending in various high courts in the country, the Rajya Sabha was informed on Tuesday. Minister of the state for law and justice Ramakant D. Khalap said in a written reply that the Allahabad high court tops the list of pending cases with 8.65 lakh cases followed by the Madras high court with 3.11 lakh cases.

He said the pending cases in high courts have gone up from 29.64 lakh cases in 1995 to 31.39 in 1996. Mr Khalap said though the aggregate number of cases pending in different high courts and subordinate courts has been increasing, the pendency in the Supreme Court has come down from 1,07,776 cases in 1990 to 23,246 cases in 1996.

The September 1997 module, and submit the same to the Admissions Committee not later than 20 August 1997.

Admissions Committee
ASEAN Business Law Program
Institute of International Legal Studies
3rd Floor Bocobo Hall
University of the Philippines Law Center
Diliman, Quezon City 1101
Philippines

About the University of the Philippines

The University of the Philippines (UP) is the premier state university of the Philippines. Established in 1908, it offers a wide array of courses in the arts and sciences, and has produced renowned experts in various academic fields. UP has produced many national leaders, including those coming from its ASEAN neighbours. Regarded as the "bastion of academic freedom," it has produced intellectuals whose critical thinking continues to influence all walks of life.

The University has established its presence in all the major island groups of the Philippine archipelago through its six autonomous units, which include an Open University.

About the Institute of International Legal Studies (IILS)

The IILS was established in 1983 to undertake research in the field of international law, specifically those areas with which the Philippines in particular and the developing world in general is involved. Aside from the ABLP which it administers, IILS also has, among others, programs on the following:

- * Asian Legal Systems
- * Law of the Sea
- * Intellectual Property Rights
- * Economic Regionalism
- * Philippines in the Global Economy

Information

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Subject: [law-dev] SINESS LAW PROGRAM LAW PROGRAM

----- Message Contents -----

THE ASEAN BUSINESS LAW PROGRAM

1-12 September 1997 Module
Subic International Hotel
Philippines

Rationale

The rapidly expanding globalization of trade and services has acutely increased the need of lawyers for enhanced facility in the business laws of different trading countries. The ASEAN Business Law Program (ABLP) is designed to enable participants to acquire a grasp of the main features of the economic laws of each of the ASEAN countries. In the process, it is hoped that lawyers give better advice on legal issues of regional proportion, and participate more effectively in business transactions transpiring in one of the most dynamic regions of the global economy.

Subjects

In the 3-14 March 1997 module, 22 lecturers presented a survey of each ASEAN country's laws on the following: contracts, business organizations and securities transactions, and investments. Each country presentation was preceded by an overview of the legal system concerned.

The September 1997 module will take place on 1-12. Lectures covered are: banking, credit transactions, and negotiable instruments law; intellectual property rights law; and tax and tariff law. Preceding these lectures are the respective overviews of each country's legal system.

Complementing these presentations are "distinguished lectures," which shall be delivered by renowned personalities in their fields. Specific topics include: "Trends in ASEAN Integration," and "The Globalization of Banking and the ASEAN's Response."

Lecturers

The lecturers are recognized experts in the different fields of law of each ASEAN member country, coming from either reputable law firms, pertinent government agencies, and/or the academe.

Admission Requirements

1. An applicant must be a lawyer (admitted to the Bar in any country);
2. With three years of private practice or government work; and
3. Must present two letters of recommendation.

Tuition and Accommodation

Tuition Rate: US\$ 800.00 per module

Accommodations (inclusive of food, for a 13-day period):

Single Occupancy	US\$ 1,000.00
Double Occupancy	US\$ 800.00
Triple Occupancy	US\$ 700.00

Venue

The venue is the Subic International Hotel in the Subic Free Port Zone. Other services such as city transportation, internet, recreation facilities - jet-skis, aquacycles, golf, horseback riding, bungee jumping, etc. - are available for a fee.

How to Apply

Applicants must accomplish the ABLP application form for

Law and Development: An Essential Dimension of Government

By Barry Metzger
General Counsel
Asian Development

As the governance debate unfolds, it can be safely said that there is now a general consensus that the creation of "an enabling environment" for economic development necessarily implies the need for laws to regulate society and the creation of institutions to ensure consistent application and enforcement of laws. This growing importance of law in the development process is reflected in the increase in the number of law-related projects and the amounts committed for them by both bilateral and multilateral donors in recent years. For example, the latest issue of the *Law and Development Bulletin*, a six-monthly Bank publication that compiles information on law-related development programming in the Asian and Pacific Region, lists 231 law-related technical assistance projects undertaken by the Bank and other multilateral institutions. Yet even this compilation is incomplete because it does not encompass legal components of project, program, and sector loans financed by the Asian Development Bank and the World Bank.

This increased focus on legal dimensions indicates that there is now a far greater realization of the importance of law in the development process than ever before. This can be attributed to a number of factors.

- First, the clarity of the perception that a wholesale revamping of the legal system is necessary to effect the transition from state-planned central economies to liberalized market-oriented economies in such countries as the Cambodia, People's Republic of China (PRC), Lao People's Democratic Republic, Mongolia, and Viet Nam.
- Second, the growing recognition that the private sector and private sector lenders must be encouraged to play a more active role in the development process than was permitted in many developing countries during the past thirty years, and that such investors and lenders require a predictable framework of rules in which commercial activity and lending activity can be conducted, including accessible and comprehensive legal rules which are actually applied and the breach of which gives rise to sanctions.
- Third, a realization that the effectiveness of government in implementing development-oriented public policies involves the use of law as an instrument of social change as well as social control, and that inefficiencies in the legal system have been a contributing factor to ineffective development policies.
- Fourth, in some countries the recognition that law and legal process can help protect the citizenry from the excesses of an overreaching state (in the PRC immediately after the Cultural Revolution, in the former Soviet Union under the Gorbachev reforms, and in Eastern Europe, the "rule of laws and not of men" has been a phrase oft-repeated by the leaders of new or reformist governments).

This focus on the legal dimensions of the development process, however, means more than simply the creation of "modern" laws which are accessible, comprehensible, and usable. There is a growing realization that specific legal interventions in the context of the Bank's project, sector, or program lending must be complemented by a more systemic approach to law and development. A systemic approach to law reform involves shifting the focus away from the "black-letter law" of the legal rules toward the institutional capabilities of the legal system, including the judiciary and government administrative and regulatory agencies. It calls for greater attention to the education, skills, and on-the-job training of the judiciary and government officials staffing legal and regulatory institutions. A systemic approach implies a shift of focus to the resources made available to the courts and regulatory agencies and to the efficiency with which such resources are utilized. The enactment of new legislation and regulations is, in some respect, the easiest part of donor-assisted law reform: it is often relatively short-term work and inexpensive. Institutional reforms and the development of the necessary human resources within such institutions, however, require longer-term commitments and greater resources.

As a step towards a systemic approach, a hallmark of the Bank's recent law-related technical assistance has been an emphasis on (i) continuing legal education for existing professionals, especially in the public sector; and (ii) enhancing the capacity of local institutions to provide training

newly-enacted laws and regulations for a market economy. Two examples of the Bank's approach are:

- the Bank's technical assistance in Cambodia, PRC, Mongolia, and Viet Nam, for institutionalizing continuing legal education; and
- the recently approved technical assistance for Mongolia on Restructuring and Capacity Building in the Ministry of Justice.

As the Bank and other donors come to realize the importance of a systemic approach to law reform, an important role they can play is to familiarize developing member countries with "best international practices" in solving common problems often faced by different legal systems. An eclectic approach to law reform which draws upon different international experiences is not altogether uncommon to the region as evident, for example, from the legal systems of South Asia (Bangladesh, India, Pakistan, and Sri Lanka), the PRC, and Japan. Indeed, in the case of Japan, the Meiji Restoration in 1868 saw a remarkable period of 20 years of institutional modernization. Feudal privileges were ended and a market economy was created for land, labor, and capital. And even though there were no foreign donors in the 1860s and 1870s to provide legal technical assistance to the Japanese reformers during the Meiji Restoration, foreign advisers played a significant role. Hermann Roesler, a German, played a significant role in the writing of the Japanese Constitution, which became effective in 1890. Two French advisors, Georges Boussquet and Gustave Boissonade, came to Japan in the 1870s to teach law and became quite active in the drafting of various codes and working with the courts in interpreting various laws. Five major codes were enacted. The enactment of such codes was an on-going process, as Japanese jurists made efforts to adopt foreign models to Japanese customs and mores. Indeed, the first codes of the Meiji Restoration were generally replaced within 10 to 20 years by new codes which were viewed as more appropriate to Japanese conditions, though still patterned after European (and particularly German) models.

Law, more than most intellectual disciplines, has been much influenced by foreign models. In the donor community today we may refer to the search for appropriate models and for the adaptation to local conditions as the application of "international best practice". The same process was at play during the Meiji Restoration, as Japanese jurists sought appropriate foreign models, and then sought to adopt them to Japanese conditions. The same process has been at play in other countries over the course of a far longer period of time and the technical assistance provided by the Bank and other donors is consistent with this historical process and has indeed helped to catalyze this process.

As the Bank and its developing member countries continue dialogue on law and development and other governance issues, experience of countries in which similar problems have been solved will enrich this dialog and assist in the search for workable and efficient solutions to governance issues. I am sure that today's seminar with its distinguished speakers and guests from around the globe will demonstrate the usefulness of such an eclectic approach.

The Bank's Governance Policy

Opening Remarks by
Taro Nishimoto
Chief, Strategy and Policy Office
Asian Development Bank

Governance, defined as "the manner in which power is exercised in the management of a country's natural and economic resources for development," is being increasingly recognized as an essential component of sustainable and equitable development. There are many ways in which good governance contributes to economic development. Governments make decisions on macroeconomic and social policy that have a direct impact on the long-term health of the economy. Governments provide critical goods and services, such as infrastructure, health and education, that determine the competitiveness of the economy. Governments foster an enabling environment for private sector growth and regulatory structures that balance objectives of growth and equity. The experience of East Asia shows that good governance is also an essential component of dynamic private sector growth — simply put, markets will not function well without it.

The presentations in Part I of this seminar by the Honorable Ruth Richardson, Mr. Isao Kubota and Mr. Abdullah Sanusi, bring out both the importance of good governance and its multifaceted nature.

In August 1995, the Board of Directors of the Asian Development Bank (ADB) approved a paper, *Governance: Sound Development Management*, that has committed the Bank to assisting its developing member countries in enhancing capabilities in this area. The paper identifies four basic elements of good governance:

- accountability, the need for public officials to be held responsible for delivering particular outputs;
- transparency;
- predictability, the need for a stable, open, and widely understood set of "rules of the game"; and
- participation, to ensure ownership and beneficiary support for development initiatives.

The ADB is the first multilateral development bank to have an official Board policy statement on governance.

We are now moving forward to implement the key thrusts contained in this paper. A Governance and Capacity Building Resource Group was recently established under the Office of the President to provide an institutional focal point for these issues within the Bank. Some basic information on the Resource Group, including the e-mail address, is available in the first issue of *our News and Notes: Governance and Capacity Building at the ADB*, which is included in the seminar materials provided to you. I urge those who are interested to contact the Resource Group for information on governance issues in general, as well as on specific activities of the ADB.

Since August 1995, we have made three loans amounting to \$290 million and over 20 technical assistance grants to help our developing member countries reform their core administrative systems. In addition, about two thirds of our loans and over 80 percent of Technical Assistance grants have the component aimed at strengthening institutional capacity. The presentations in Part II of this seminar represent some of the prominent examples of the Bank's loans and technical assistance in the area of governance.

Our work on governance and capacity-building issues is organized along several dimensions. There is a strong public sector management component that covers the parastatal sector, as well as how governments prepare and implement policies and deliver public services. A second dimension is private sector development and the role of governments in creating and fostering an enabling environment for private sector growth. Another dimension is strengthening civil society, which includes participation of stakeholders and beneficiaries in development policies and projects and a growing role of NGOs in delivering certain services. Keeping these in view, the thrusts of the Resource Group include public administration reforms in South Asia, a greater focus on public sector outputs and their measurement, increased responsibility on the part of executing agencies to

gn projects, and restructuring and improving municipal management in major cities.

ident Sato has stated on many occasions that the relevance of our Bank in the coming years will be measured by much more than just our financial contribution to development. In my view, the Bank will continue to be relevant only if it can help bring about lasting improvement in institutional capabilities of our developing member countries in addressing problems of development.

ally, I would like to emphasize that good governance is the responsibility of all. There are many people today who have thought extensively about these issues and done work in this area, and we would like to benefit from your ideas and experience. Also it has been demonstrated time and again that involvement of stakeholders is essential for the success of all reform efforts. We therefore hope that this seminar will serve as an important step in building a partnership between our member countries, civil society organizations, and the Bank to promote good governance in the region for sustainable and equitable growth and development.

On the occasion of the Asian Development Bank's 30th Annual Meeting in May 1997 at Fukuoka, Japan, it was deemed appropriate to hold a seminar on a theme pertinent to the Bank's mandate. A decision was therefore taken to invite an elite group of high-level speakers to address the subject of *Governance: Promoting Sound Development Management*. This publication is a summary of these presentations.

The focus of the seminar was on public administration and legal system reforms. First, Messrs. Shoji Nishimoto and Barry Metzger of the Asian Development Bank provided an overview of Bank's policy and practice in the area of Governance.

In his Opening Remarks, Mr. Shoji Nishimoto emphasized that governance is increasingly recognized as an essential component of sustainable and equitable development. In August 1995, the Bank's Board approved a policy paper, *Governance: Sound Development Management*. This paper committed the Bank to assisting its developing member countries to enhance their capabilities in this area. A Governance and Capacity Building Resource Group was recently established under the auspices of the President to provide an institutional focal point for these issues within the Bank. Mr. Nishimoto concludes by expressing the view that, given the rapidly changing global economic environment, the Bank will continue to be relevant only if it can help bring about lasting improvement in institutional capabilities of its developing member countries to manage development.

According to Mr. Barry Metzger, it is generally agreed that the creation of an enabling environment for economic development implies the need for laws to regulate society, as well as the creation of institutions that ensure consistent application and enforcement of those laws. A focus on the legal dimensions of the development process, however, means more than simply the creation of "modern" laws. It is of crucial importance to communicate the idea that specific legal interventions must be complemented by systemic approaches to law and development. A systemic approach implies a shift in focus to the resources made available to the courts and regulatory agencies, as well as to the efficiency with which such resources are utilized. Mr. Metzger concludes that, as a step towards a systemic approach, the Bank's recent law-related assistance emphasizes continuing legal education for existing professionals, especially in the public sector; and enhancing the capacity of local institutions to provide training in newly enacted laws and regulations for a market economy.

The two Bank presentations were followed by three distinguished speakers from New Zealand, Japan, and Malaysia who advocated different approaches to public administration reform.

The keynote speaker, the Honorable Ruth Richardson, former Finance Minister of New Zealand, is a proponent of the "big bang" approach to governance. Outlining how market-oriented governance reforms had transformed the economy of New Zealand, she cites the recent experience of her country as proof positive that the quality of development management is a cornerstone of prosperity. New Zealand's governance reforms, which began in 1984, utterly transformed the country's economic performance in only ten years. Its average growth has been number one among members of the Organization for Economic Co-operation and Development (OECD) since 1991, its unemployment rate is low, and the Government's budget now runs a surplus. Recent international surveys place New Zealand at the top in terms of competitiveness and economic freedom. In her presentation, Ms. Richardson explains that the New Zealand reforms were derived from a "rethink" of the entire role of

the State. The reformers were tasked with identifying those areas where the State had a legitimate role and how its job could be most effectively fulfilled. The result was the wholesale separation of commercial functions from other Government functions. Ms. Richardson concludes that while there is no panacea for economic woes, global lessons, whether derived from the spectacular emergence of East Asia or the radical reforms of New Zealand, are the same. Nothing is more important than sound development management that combines good governance with sensible economic policy.

Mr. Isao Kubota, Director General, Ministry of Finance, Japan, provides an alternative view on the role of the Government in economic development. He cautions against wholesale acceptance of the belief that the East and Southeast Asian economic success stories are the result of good governance. When discussing the role of Government, the approach of the "new orthodoxy" is to assume that the Government and the private sector are enemies by nature — that Government is a kind of necessary evil, and the smaller it is, the better. Mr. Kubota argues that this is not the lesson one should derive from the successful Asian economic stories. Rather, the lesson is that the Government and the private sector have basically similar goals and that when they work together to identify the optimal development policy aims for their country, and effect policy measures to achieve these goals, the full potentialities of the country are realized.

Like Mr. Kubota, Mr. Abdullah Sanusi Ahmad, Vice Chancellor, University of Malaya, stresses the importance of Government-private sector cooperation and endorses a gradual approach to reform. He reflects that the most significant change in public administration in Malaysia started with the establishment of the Malaysian Administrative Modernization and Manpower Planning Unit (MAMPU) in 1977. MAMPU's objectives included providing management consultant services to government organizations, carrying out administrative reforms, and coordinating activities on human resource planning and development for effective management. During the 1980's a number of innovations and ideas were introduced and implemented. These included Government-private sector cooperation under the concept of "Malaysia Incorporated", replacement of western countries as role models by Japan and South Korea under the "Look East Policy", and programs that resulted in significant changes in the values and productivity of the civil servants. Dr. Sanusi concludes that even though administrative reforms and transformation in Malaysia began more than two decades ago, the goal of excellence is ongoing and must be continually nurtured.

The three presentations on approaches to public sector reform were followed by three case studies of Bank-assisted governance and legal system reform. These were presented by key representatives of the Governments of Sri Lanka, Gujarat (India), and Mongolia.

Presenting the first case study, Dr. Lal Jayawardena, Economic Adviser to the President of Sri Lanka, states that the primary economic goal of the Government is the elimination of the overall budget deficit by the year 2000. This means nothing less than eliminating loss-incurring enterprises, cutting subsidies, and reducing the civilian public service wage bill and the pension burden. The objective of these reforms is to have an efficient, motivated, result-oriented and a vastly slimmed down public administration. Dr. Jayawardena explains that two main instruments of reform will be created: an Administrative Reforms Management Division, charged with designing the reform program and overseeing its implementation; and a Management Council, charged with providing a single, central focus for all strategic policy initiatives and ensuring the overall coordination of policy development. Two additional elements of the reform process explained by Dr. Jayawardena are the signing of sole authority for public service appointments to an independent and revitalized Public Service Commission, and the identification of redundant departments and institutions as candidates for elimination.

The second case study is presented by Mr. S. K. Shelat, Chief Secretary Government of the Indian State of Gujarat. Mr. Shelat tells how a weak and deteriorating fiscal position, a large state owned enterprise sector that was draining resources, and infrastructure investment requirements far in excess of available public resources obliged the Government of Gujarat to initiate reforms. The process began in 1994, and, with Bank support, a program aimed at reducing the State's role in commerce and enhancing private sector participation in the economy was adopted. As a result of the reforms the Government will vacate areas that can be successfully operated by the private sector. Mr. Shelat explains how the successful completion of the program will put Gujarat on the road to self reliance and improve the quality of life of its citizens.

Presenting the final case study, Mr. Jigjid Unenbat, Governor Bank of Mongolia, explains how the

Bank's law and development program assisted with legal training, advice on commercial legislation, translation into English of the Civil Code, and preparation of a compendium of principal commercial and economic laws. Assistance was also provided for reviewing the legal framework for restructuring and liquidating commercial banks, amending the banking law and regulations, enacting the Central Bank Law, and preparing a business plan for the Ministry of Justice. Mr. Unenbat describes the Bank's assistance in establishing a retraining center for teaching legal professionals to apply market economy principles in commercial laws and regulations, and in such lawyering skills as negotiating and drafting legal agreements and regulations.

Taken as a whole, these eight presentations represent an important addition to the literature on the subject of governance. The Bank's careful selection of speakers ensured that the subject would be addressed engagingly by some of the prime movers of reform in the Asian and Pacific Region.

the village vote

The establishment of village councils' has given rural Indians a voice, as **Ravi Chopra** explains.



This quiet village in Andhra Pradesh

will be over run by election fever when the Panchayat is voted in.

Liba Taylor/Panos Pictures

the once-fabled forest land of Bihar, where the Chotanagpur plateau slopes rapidly to join the Ganges plain, lies the district of Palamau. Nearly half the population is made up of either harijans, once labelled 'untouchables' by the Hindu caste system, or the original forest dwellers, the tribal people. With the literacy level in some villages hovering below five per cent, these communities survive either as agricultural labourers or through subsistence farming and the sale of forest products. Recently their quality of life has been threatened further by deforestation. Now, water drains straight out of Palamau, leaving its rivers dry during summer months. Not surprisingly, such poverty has led to outbursts of social and political violence.

To counter this trend, the government throws hundreds of millions of rupees annually at development projects in the region. But the money never reaches the harijans or tribal people. Each time, it is siphoned off by well-entrenched cabals of contractors, government officials and local politicians. "Bihar is known as the pc state," says Bholaji, a Palamau native, "pc meaning percentage. A fixed percentage is siphoned off for each type of development project." Thus the intended benefits of development spending are never realised.

taking control

One day, things changed. When Palamau faced its worst-recorded rainfall failure in 1992, two enlightened district administrators took action. Santosh Mathew and Shiva Kumar decided to build small earthen dams to store rain water for irrigation. And they encouraged village-based organisations called Pani Panchayats, or Water Councils, to execute the projects. "Our aim was to prevent the contractors from pocketing the funds," says Kumar. "We thought that establishing village level organisations to execute these projects would help bypass the contractors' networks." Next, Santosh Mathew helped evolve a programme, Sukha Mukti Abhiyan (SMA), to make Palamau completely drought-proof. The village Pani Panchayats managed the project, while the district administration provided the funds. Meanwhile, a development institute called People's Science Institute (PSI) offered technical and managerial support. To promote self-reliance, each village was required to do Shramdan or voluntary work, such as clearing land for an hour a day, and the money saved was put into a Gram Kosh or 'development fund' to be used by the villagers.

An inspired result

In two years, the village Pani Panchayats had built 176 earthen dams in 125 villages, to irrigate nearly 4500 acres. Almost a million workdays of employment were generated, while against a planned investment of Rs 40 million, barely Rs 33 million were spent. And the Gram Kosh now holds over a million rupees, a fund drawn upon for villagers' weddings or roof repairs.

Far more important than the physical achievements is that the peoples' trust has been won and their confidence built up. They view this as their own, rather than a government programme," says Meghnath, an SMA activist. In fact, villagers have been so inspired by being able to control their own projects, that some have implemented other projects in afforestation, fish farming, land reclamation, and even a food processing enterprise. "When people are empowered to undertake

their own development, they focus on their immediate needs. In our area, these were food production and employment. Decentralised management resulted in elimination of corruption and tremendous cost savings," says Santosh Mathew.

"Those of us who have been left out of the development process so far are impatient for progress."

Encouraged by this and other positive

Examples of decentralised decision-making, the government of India enacted legislation in 1993 to establish 'Panchayati Raj', or village councils, as a form of local government, building on the concept of village republics enunciated by Mahatma Gandhi. Each Panchayat or village council is made up of around seven members and has a term of five years. They currently only receive around Rs 50,000 a year from the government, but the point is they can spend it how they wish and the money goes directly to the Panchayat without getting 'lost' along the way. Each council meets when it chooses, and villagers can have a say in how they'd like the money spent. Some might save up to build a road, others a water tank or school community centre, while some might buy better seeds for agriculture.

platform for all

Not surprisingly, the system has been embraced by rural Indians, particularly women and members of scheduled castes and tribes who are, by law, represented on the councils. In fact, the Panchayats have enabled a million women and about half a million scheduled caste and tribe people to become part of local government institutions and the development process. Now, creches for working mothers and schools for girls are sprouting all over India as a result of women's input. Kameshwari Devi, a young woman from Kita village in Palamau, says: "For the first time, we have a platform. Earlier, when we tried to discuss issues of our concern, we were silenced by our menfolk. Now, because of village-level participation, we have learned of our rights and potential. We aim to establish a primary school for girls in our village."

The system is now being rolled out and elections held to establish as many as 220,000 Panchayats in villages everywhere bar Central India's tribal belt. In the run up to Panchayat elections, India's villages are a hive of campaigning. Individuals hoping to be voted in stick posters on trees, canvass opinion and deliver leaflets, while in many villages 80 per cent of the population turn out to vote. In rural West Bengal, Panchayat elections are so frenzied they take the shape of a mini-general election. The number of village seats in Bengal is now as many as 61,010. Nearly a third of those are reserved for women and the intensity of the struggle can be gauged by the number contesting - 64,235 women have submitted their nomination papers for 24,700 seats in the May '98 election.

The threats to success

But decentralisation is not without its challenges. The Palamau experiment only worked because the operational procedures had been thought through clearly. "Decentralisation is not a magical mantra which works miracles if one chants it enough," emphasises Salil Das, who co-ordinated SI's work in Palamau.

In many villages, attempts to empower the weakest sections of the population have been frustrated because they feel handicapped by their own illiteracy. As Ms. Minz, a tribal from Hisri village in Palamau explains: "We almost lost our dams due to our illiteracy. An educated person can complete a bank transaction in one visit. Because we are illiterate, the bank officials keep us waiting. It takes us four visits to withdraw our own money. This delayed payment to the labourers and the construction was held up occasionally. When the rains came, our dam was not complete and we had to work day and night to save it. Education of our people is my first priority when the Panchayats are fully established here."

The reluctance of existing power centres, particularly state-level politicians, to hand over money and responsibility, poses a greater problem. As Manoj Kumar, a tribal from Palamau explains: "Those of us who have been left out of the development process so far are impatient for progress. But those who have kept us backward until now are not willing to let go." Yet, there are also fears that village councils will only create another tier of corruption. "Until now, we have seen political leaders use their positions for personal gain," says Lalit Mahto, a young engineer from Garhwa.

district, bordering Palamau. "In the absence of honest role models, the new crop of local leaders is likely to do the same." Others disagree. As Dorothy Xaxa from Rud village puts it: "The fearlessness of the people - the electors - to the new centres of power, will help them confront abuses of power." The experience in Palamau suggests she is right: people took action, even against those who feared oppressors, wherever there was seen to be misuse of power.

The funding issue

Mahatma Gandhi held that political decentralisation was only halfway to reform. To succeed, it had to be accompanied by economic decentralisation. This issue poses another question over the long-term sustainability of the government's experiment since funds are still centrally managed with a minimal amount currently reaching village councils. But as L. C. Jain, who shaped the Panchayati Raj legislation in Karnataka says; "For the sake of preservation of democracy, it is important to have even this limited exercise in potential decentralisation. Whether it manages to transform the economic system in the future must be left to the future."

Perhaps of more immediate concern is the possibility of violence at village elections which take place across a state at a time. The system has given millions of people a unique chance to speak out. For them, there is much at stake. As Prabhat Sarangi, a member of the Administrative Service, warned: "The Panchayat elections are likely to be the bloodiest ever."

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